



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

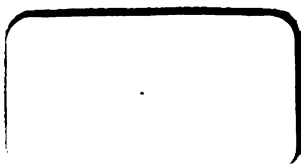
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE

7424.1793

LAW QUARTERLY REVIEW.

EDITED BY

SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.

VOL. XXII.

LONDON:

STEVENS AND SONS, LIMITED, 119 & 120 CHANCERY LANE.

AGENT FOR UNITED STATES OF AMERICA, THE BOSTON BOOK CO., BOSTON.

AGENT FOR CANADA, THE CARSWELL CO., LIMITED, TORONTO.

OXFORD: PRINTED AT THE UNIVERSITY PRESS.

1906.

Oxford

HORACE HART, PRINTER TO THE UNIVERSITY

***LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.***

INDEX OF SUBJECTS.

	PAGE
BENTHAM, JEREMY. By H. J. Randall, jun.	311
CASE-LAW, THE BASIS OF. By A. H. F. Lefroy	293, 416
CHINESE LAW AND EQUITY, THE PRINCIPLES OF. By Edward H. Parker	190
FALSE PASSPORTS CASE, THE. By Herman Cohen	34
FOREIGN CORPORATION, LEGAL PERSONALITY OF A. By E. Hilton Young	178
FUTURE INTERESTS IN LAND. By Albert Martin Kales	250, 383
GODFREY, SIR EDMUND BERRY, THE CASE OF. By John Pollock	431
HIGH COURT AND THE COUNTY COURTS, CONSOLIDATION OF THE. By Thomas Snow	127
HINDU LAW, ORIGIN AND DEVELOPMENT OF THE BENGAL SCHOOL OF. By Hon. Sarada Charan Mitra	50
HUSBAND AND WIFE, CHANGES IN THE LAW OF. By Alfred Fellows	64
INTERNATIONAL LAW, IS IT A PART OF THE LAW OF ENGLAND? By J. Westlake, K.C.	14
KATHIAWAR JURISDICTION CASES, THE. By Sir A. C. Lyall, K.C.B., G.C.I.E.	246
LAW SOCIETY ON OFFICIALISM, THE. By Sir Howard W. Elphinstone, Bart.	27
LEGAL CONCEPTIONS FROM A PRACTICAL POINT OF VIEW. By James Edward Hogg	172
MAINE'S 'ANCIENT LAW,' NOTES ON. By Sir F. Pollock, Bart.	73
MANX LAND TENURE. By Reginald D. Farrant	136
MARINE INSURANCE—THE SUE AND LABOUR CLAUSE. By H. Birch Sharpe	406
MARITIME SALVAGE. By H. Birch Sharpe	163
MARSHALLING OF MORTGAGES, THE. By W. Strachan	307
MONEY-LENDERS ACT, 1900, CONSTRUCTION OF THE. By L. J. Sturge	213
PROTECTED LIFE ESTATES. By W. J. Leofric Ambrose	401
TRUSTEE'S FAILURE TO CONVERT AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN, THE CONSEQUENCES OF. By Walter G. Hart	285
YEAR BOOKS, THE. By W. S. Holdsworth	266, 360

INDEX OF CONTRIBUTORS.

	PAGE
AMBROSE, W. J. LEOPRIC.—Protected Life Estates	401
COHEN, HERMAN.—The False Passports Case	34
ELPHINSTONE, SIR HOWARD W.—The Law Society on Officialism	27
FARRANT, REGINALD D.—Manx Land Tenure	136
FELLOWS, ALFRED.—Changes in the Law of Husband and Wife	64
HART, WALTER G.—The Consequences of a Trustee's Failure to Convert as between Tenant for Life and Remainderman	285
HOGG, JAMES EDWARD.—Legal Conceptions from a Practical Point of View	172
HOLDSWORTH, W. S.—The Year Books	266, 360
KALES, ALBERT MARTIN.—Future Interests in Land	250, 383
LEFROY, A. H. F.—The Basis of Case-Law	293, 416
LYALL, SIR A. C.—The Kathiawar Jurisdiction Cases	246
MITRA, HON. SARADA CHABAN.—The Origin and Development of the Bengal School of Hindu Law	50
PARKER, EDWARD H.—The Principles of Chinese Law and Equity	190
POLLOCK, SIR FREDERICK.—Notes on Maine's 'Ancient Law' con- cluded	73
———JOHN.—The Case of Sir Edmund Berry Godfrey	431
RANDALL, H. J., jun.—Jeremy Bentham	311
SHARPE, H. BIRCH.—Maritime Salvage	163
———Marine Insurance—The Sue and Labour Clause	406
SNOW, THOMAS.—The Consolidation of the High Court and the County Courts	127
STRACHAN, W.—The Marshalling of Mortgages	307
STURGE, L. J.—The Construction of the Money-Lenders Act, 1900	213
WESTLAKE, J., K.C.—Is International Law a Part of the Law of England?	14
YOUNG, E. HILTON.—The Legal Personality of a Foreign Corporation	178

SUBJECTS OF BOOK REVIEWS AND NOTES.

	PAGE
Abbott (J. Carson).— <i>See</i> Freeman (Marshall).	
A B C Guide to Practice, 1906 (4th ed. by F. A. Stringer) . . .	107
Allen (Ernest K.).—Law of Corporate Executors and Trustees . . .	348
Allwood (G. F.).—Appeal Cases under Weights and Measures Acts	462
American Bar Association, Annual Meeting, 1905 (n.) . . .	12
American Law Schools (n.)	13
Annual County Courts Practice, 1906.—Ed. by His Honour Judge W. C. Smyly, K.C., and W. J. Brooks	116
Annual Digest, 1905.—Ed. by John Mews	230
Annual Practice, 1906.—Ed. by Thomas Snow, Charles Burney, and Francis A. Stringer	107
Anson (Sir W. R., Bart.).—Principles of the English Law of Contract (11th ed.)	462.
Arbiter in Council, The	233
Ashworth (P. A.).— <i>See</i> Taswell-Langmead (T. P.).	
Atkinson (E. H. Tindal).— <i>See</i> Yearly County Court Practice, 1906.	
Atkinson (Frederick Walton).—Law and Practice relating to Solicitors' Liens and Charging Orders	111
Atlay (J. B.).—The Victorian Chancellors	235
Baldwin (Simeon E.).—The American Judiciary	102
Barlow (C. A. Montague) and Hicks (W. Joynson).—Law of Heavy and Light Mechanical Traction on Highways	236
Bateson (Mary).—Borough Customs, Vol. II	462
Baynes (William E. C.).— <i>See</i> Encyclopaedia of Forms.	
Beatty (Charles).—Practical Guide to the Death Duties	351
Benjamin (Judah P.).—Treatise on the Law of Sale of Personal Property (5th ed. by W. C. A. Ker and A. R. Butterworth) . . .	334
Bennett (J. F. C.) and Eades (E. J.).—Practitioner's Guide to the Duties of Executors and Administrators (3rd ed.)	351
Best's Principles of Evidence (10th ed. by J. M. Lely)	453
Bigelow (Melville M.).— <i>See</i> Centralization and the Law.	
Blackstone's Commentaries, pagination of (n.)	356
Blagden (Charles O.).— <i>See</i> Encyclopaedia of Forms.	
Blias (E. Church).— <i>See</i> Yearly Supreme Court Practice.	
Bompas (Harold B.).— <i>See</i> Encyclopaedia of Forms.	
Bouchier-Chilcott (Thomas).—Law of Mortmain	114
Bowstead (William).— <i>See</i> Melsheimer (Rudolph E.).	
Briggs (William).—Law of International Copyright	329
Bristowe (L. S.).— <i>See</i> Tudor's Charitable Trusts.	
Brooks (William James).— <i>See</i> Annual County Courts Practice, 1906.	
Brown (Baldwin).—Care of Ancient Monuments	231
Browne (J. H. Balfour, K.C.).— <i>See</i> Railway and Canal Cases.	
Brunetti (Giovanni).—Il Delitto Civile	463
Buchan (John).—Law relating to the Taxation of Foreign Income . .	116

	PAGE
Buckle (Harry O.).—Civil Practice of the Magistrates' Courts in the Transvaal	236
Bullen and Leake's Precedents of Pleading (6th ed. by Cyril Dodd, K.C., and T. Willes Chitty)	106
Burdett (Halford G.).— <i>See</i> Tudor's Charitable Trusts.	
Burney (Charles).— <i>See</i> Annual Practice.	
Butterworth (Arthur R.).— <i>See</i> Benjamin (Judah P.).	
Cane (A. B.).— <i>See</i> Revised Reports.	
Carr (C. T.).—General Principles of the Law of Corporations	234
Carter (A. T.).—History of English Legal Institutions	348
Centralization and the Law.—(Introduction by Melville M. Bigelow)	320
Cherry (B. L.).— <i>See</i> Wolstenholme's Conveyancing and Settled Land Acts.	
Chironi (G. P.).—La Colpa nel diritto Civile Odierno	236
Chitty (T. Willes).— <i>See</i> Bullen and Leake.	
— <i>See</i> Yearly Supreme Court Practice.	
Clerk (J. F.) and Lindsell (W. H. B.).—Law of Torts (4th ed. by Wyatt Paine)	335
Code Civil Allemand	463
Cohen (E. Arakie).—London Building Acts, 1894–1905	236
Coltman (F. J.).— <i>See</i> Ward (D.).	
Comyns (Henry J.).— <i>See</i> Mackenzie (William W.).	
Davenport (F. G.).—Economic Development of a Norfolk Manor, 1086–1565	463
Dernstedt (M.) and Voigtländer (F.).—Der Nachweis von Schriftfälschungen, Blut, Sperma u. s. w. . . . mit einem Anhang über Brandstiftungen	234
Disney (Henry W.).—Law of Carriage by Railway	114
Dodd (Cyril, K.C.).— <i>See</i> Bullen and Leake.	
Dunn (R. H.).— <i>See</i> Norton (Robert, K.C.).	
Eades (E. J.).— <i>See</i> Bennett (J. F. C.).	
Ehrlich (Eugen).—Soziologie und Jurisprudenz	320
Ellis (Geoffrey).— <i>See</i> Law Annual, 1906.	
Elphinstone (Sir Howard W.).— <i>See</i> Goodeve (L. A.).	
Encyclopaedia of Forms and Precedents, Vols. IX, X, and XI (edited by Arthur Underhill, assisted by H. B. Bompas, C. O. Blagden, W. E. C. Baynes, E. J. Naldrett, Horace Freeman, R. Powell-Williams, H. B. Vaisey, and H. H. King)	103, 227, 456
Encyclopaedia of Local Government Law.—Vols. I and II, ed. by Joshua Scholefield	108, 344
Encyclopaedia of the Laws of England (2nd ed. by Mr. Justice A. Wood Renton and Max. A. Robertson)	461
Erratum	13
Evans (Frank).— <i>See</i> Palmer (Francis B.).	
Farran (E. C.).— <i>See</i> Walker (R. A.).	
Fox (John C.).— <i>See</i> Yearly Supreme Court Practice.	
Francke (P. M.).— <i>See</i> Yearly Supreme Court Practice.	
Fraser (H.).—Law of Parliamentary Elections and Election Petitions	225

	PAGE
Free Church of Scotland Case, An American criticism of (n.) . . .	126
Freeman (Horace).— <i>See</i> Encyclopaedia of Forms.	
— (W. Marshall) and Abbott (J. Carson).—A B C of Parliamentary Procedure	236
Gardner (Samuel).— <i>See</i> Melsheimer (Rudolph E.).	
Goodeve (L. A.).—Modern Law of Real Property (5th ed. by Sir Howard W. Elphinstone and Frederick T. Maw)	332
Grasserie (Raoul de la).— <i>Les Principes sociologiques du droit civil</i> . . .	320
Gray (John Chipman).—Rule against Perpetuities (2nd ed.) . . .	323
Hart (Heber).—Law of Banking (2nd ed.)	452
Hartmann (Adolf).—Die Strafrechtspflege in Amerika mit Ausführungen zur Deutschen Strafprozessreform	455
Hartshorne (Charles H.).—Courts and Procedure in England and in New Jersey	115
Hearth, The, as a memorial of ownership (n.)	3
Henderson (J. S.).—Analytical Digest of Cases published in the Law Journal Reports and the Law Reports, 1901-5	462
Henriques (H. S. Q.).—Law of Aliens and Naturalization	350
Hicks (W. Joynson).— <i>See</i> Barlow (C. A. Montague).	
Highmore (N. J.).—The Customs Laws	458
Hill (G. R.).— <i>See</i> Yearly Digest.	
Hogg (James Edward).—Treatise on the Law relating to Ownership and Incumbrance of Registered Land	337
Holland (T. E., K.C.).—Elements of Jurisprudence (10th ed.) . . .	461
Hudson (Alfred A.), assisted by Miller (H. E.), Peck (W. A.), and Humphries (S.).—Law of Compensation	228
Hume-Williams (W. E., K.C.).— <i>See</i> Pitt-Taylor (His Honour Judge).	
Humphries (S.).— <i>See</i> Hudson (Alfred A.).	
Hunt (Cecil A.).— <i>See</i> Tudor's Charitable Trusts.	
Hurst (Joseph) and Cecil (Lord Robert).—The Principles of Commercial Law (2nd ed.)	459
Iselin (J. F.).— <i>See</i> Williams (T. Cyprian).	
Jackson (J. H.).—Law of Repairs and Improvements, including Ecclesiastical Dilapidations	233
Jardine (Willoughby).— <i>See</i> Yearly County Courts Practice, 1906.	
Jenks (Edward), Geldart (W. M.), Holdsworth (W. S.), Lee (R. W.), and Miles (J. C.).—Digest of English Civil Law	100, 333
Johnston (J.).— <i>See</i> Sweet and Maxwell's Diary, 1906.	
Journal of the Society of Comparative Legislation (ed. by Sir John Macdonell, C.B., and Edward Manson)	349
Kenrick (G. H. B.).— <i>See</i> Strahan (J. Andrew).	
Ker (Walter C. A.).— <i>See</i> Benjamin (Judah P.).	
Kerly (D. M.) and Underhay (F. G.).—Trade Marks Act, 1905 . . .	351
King (Humphrey H.).— <i>See</i> Encyclopaedia of Forms.	
Knee (A. W. Colston).—Inequalities of English Law	235
Koe (Digby L. F.).— <i>See</i> Norton (Robert F., K.C.).	
Konstam (E. M.).—Rates and Taxes	351

	PAGE
Kowalewsky (Maxime).—Die ökonomische Entwicklung Europas	115
Krabbe (H.).—Die Lehre der Rechtssouveränität	116
Langdell, Professor, the late (n.)	353
Law List, indexing of Mahometan names in (n.)	245
Law Annual, 1906 (ed. by Geoffrey Ellis and Max. A. Robertson)	115
Law Association of Philadelphia	350
Leage (R. W.).—Roman Private Law	326
Leake (S. Martin).—Principles of the Law of Contracts (5th ed. by A. E. Randall)	322
Lely (J. M.).— <i>See</i> Best's Principles of Evidence. ——— Statutes of Practical Utility, passed in 1905	116
Lindley, Lord, retirement of (n.)	3
Lindsell (W. H. B.).— <i>See</i> Clerk (J. F.).	
Livesey (David).—Manual of Licensing Applications	351
Lucas (William W.).— <i>See</i> Yearly Supreme Court Practice.	
Lushington (S. G.).— <i>See</i> Ward (D.). ——— <i>See</i> Yearly Supreme Court Practice.	
Macdonell (Sir John, C.B.).— <i>See</i> Journal of the Society of Com- parative Legislation.	
McDougall (D. G.).—Self-governing Colonies	349
Macgillivray (E. J.).—Digest of the Law of Copyright	454
MacKenzie (M. Muir).— <i>See</i> Yearly Supreme Court Practice. ——— (William W.) and Comyns (Henry J.).—Overseer's Hand- book (6th ed.)	350
Macnaghten (Hon. C., K.C.).— <i>See</i> Palmer (Francis B.).	
Macnamara (W. H.).— <i>See</i> Railway and Canal Cases.	
Macqueen (John Fraser, Q.C.).—Rights and Liabilities of Husband and Wife (4th ed. by Wyatt Paine)	110
Maitland (F. W.).— <i>See</i> Selden Society.	
Manson (Edward).— <i>See</i> Moore (H.). ——— <i>See</i> Journal of the Society of Comparative Legislation.	
Marion (André).—La loi du domicile en matière successorale selon la jurisprudence anglaise	451
Markby (Sir William, K.C.I.E.).—Introduction to Hindu and Mahom- medan Law	462
Matthews (Joseph B.).—Law of Money-lending	232
Maw (F. T.).— <i>See</i> Goodeve (L. A.).	
Maxwell on the Interpretation of Statutes (4th ed. by J. Anwyll Theobald)	105
Meili (F.).—International, Civil, and Commercial Law as founded upon Theory, Legislation, and Practice	98
Melsheimer (Rudolph E.) and Gardner (Samuel).—Law and Customs of the Stock Exchange (4th ed. by William Bowstead)	115
Mews (John).— <i>See</i> Annual Digest.	
Miller (H. E.).— <i>See</i> Hudson (Alfred A.).	
Moore (H.).—Handbook of Practical Forms (4th ed. by E. Manson)	110
Moore (W. Harrison).—Act of State in English Law	462

	PA3A
Morice (George T.).—English and Roman-Dutch Law (2nd ed.)	236
Morrow (F. St. John).—Building Cases	460
Moyle (J. B.).—Institutes of Justinian (4th ed.)	351
Mulla (Dinshah Fardunji).—Principles of Mahomedan Law	99
Naldrett (E. J.).— <i>See</i> Encyclopaedia of Forms.	
Neave (Frederick G.).—Handbook of Commercial Law	111
Netherlands Civil Code, The (<i>n.</i>)	12
Neville (Ralph).— <i>See</i> Railway and Canal Cases.	
Norton (Robert F., K.C.), assisted by Dunn (R. H.) and Koe (Digby L. F.).—Treatise on Deeds	337
Oppenheim (L.).—International Law, Vol. II	222
Paine (Wyatt).— <i>See</i> Clerk (J. F.).	
— <i>See</i> Macquern (John Fraser, Q.C.).	
Palmer (Francis B.), assisted by Macnaghten (Hon. C., K.C.) and Evans (Frank).—Company Precedents (9th ed.)	231
Parow (Prof. Dr.).— <i>Compotus Vicecomitis</i>	328
Pease (J. G.).— <i>See</i> Revised Reports.	
Peck (W. A.).— <i>See</i> Hudson (Alfred A.).	
Pennant (Douglas Falconer).—Trade Unions and the Law	114
Piepowder, The Court of (<i>n.</i>)	244
Pike (Luke Owen).— <i>See</i> Year Books Edward III.	
Pitt-Lewis (G., K.C.).— <i>See</i> Yearly County Court Practice, 1906.	
Pitt-Taylor (His Honour Judge).—Treatise on the Law of Evidence as administered in England and Ireland (10th ed. by W. E. Hume-Williams, K.C.)	325
Pollock (Edward).— <i>See</i> Russell on Arbitration.	
— (Sir Frederick).— <i>See</i> Revised Reports.	
— (Harold Warren).— <i>See</i> Russell on Arbitration.	
Porter (James Biggs).—Manual of the Law of Principal and Agent	111
Potton (Edward).—Index-Digest of the Cases reported in Vols. I-LXV, Revised Reports	116
Powell (Arthur, K.C.).—Lawyer's Remembrancer and Pocket Book, 1906	116
Powell-Williams (R.).— <i>See</i> Encyclopaedia of Forms.	
Powles (L. D.).—Brown and Powles' Law and Practice in Divorce (7th ed.).	116
Railway and Canal Traffic Cases, Vol. XII, ed. by J. H. Balfour Browne, K.C., W. H. Macnamara, and Ralph Neville	462
Randall (A. E.).— <i>See</i> Leake (S. Martin).	
Raphaely (Siegfried).— <i>See</i> Van Hoytema (J. P. R.).	
Redlich (Josef).—Recht und Technik des Englischen Parlamentarismus, &c.	224
Renton (Mr. Justice A. Wood).— <i>See</i> Encyclopaedia of the Laws of England.	
Revised Reports (edited by Sir F. Pollock, assisted by O. A. Saunders, J. G. Pease, and A. B. Cane)	116, 235, 351, 462
Ridges (Edward Wavell).—Constitutional Law of England	115

	PAGE
Ringwood (Richard).— <i>Outlines of the Law of Torts</i>	229
Roberts (J. R.).— <i>See Stone's Justices' Manual.</i>	
Robertson (Max. A.).— <i>See Law Annual, 1906.</i>	
————— <i>See Encyclopaedia of the Laws of England.</i>	
Robinson, Christopher, K.C., the late (n.)	I
Roughead (William).— <i>The Trial of Dr. Pritchard</i>	347
Royal Historical Society, <i>Transactions of</i> (n.)	13
Russell (Arthur E.).— <i>See Wolstenholme's Conveyancing and Settled Land Acts.</i>	
Russell on Arbitration (9th ed. by Edward Pollock and Harold Warren Pollock)	226
Sanderson (W. A.).— <i>The Law relating to Factories and Shops in Victoria</i>	462
Saunders (O. A.).— <i>See Revised Reports.</i>	
Scholefield (Joshua).— <i>See Encyclopaedia of Local Government Law.</i>	
Scott (S. B.).— <i>See West (Leonard H.).</i>	
Selden Society Publications: Borough Customs, Vol. II (ed. by Mary Bateson)	462
————— <i>Year Books of Edward II, Vol. III (ed. by F. W. Maitland)</i>	222
Sellers (William).— <i>Handbook of Legal Medicine</i>	462
Simey (Ralph Iliff).— <i>See Smith (John William).</i>	
Smith (Charles M.).— <i>Treatise on the Law of Master and Servant</i> (6th ed. by Ernest M. Smith and A. C. F. Boulton, M.P.)	345
Smith (John William).— <i>A Compendium of Mercantile Law</i> (11th ed. by Edward Louis de Hart and Ralph Iliff Simey)	95
Smyly (William Cecil, K.C.).— <i>See Annual County Courts Practice, 1906.</i>	
Snow (Thomas).— <i>See Annual Practice.</i>	
Spencer (Aubrey J.).— <i>Agricultural Holdings Acts, 1883-90</i>	350
Speyer (H.).— <i>La Constitution juridique de l'empire colonial britannique</i>	94
Spirit of our Laws	348
State Divorce Decrees and the Constitution of the United States (n.)	237
Stone's Justices' Manual (38th ed. by J. R. Roberts)	235
Strahan (J. Andrew) and Kenrick (G. H. B.).— <i>Digest of Equity</i>	109
Street (Thomas Atkins).— <i>The Foundations of Legal Liability</i>	462
Stringer (F. A.).— <i>A B C Guide to Practice, 1906 (4th ed.)</i>	107
————— <i>See Annual Practice.</i>	
————— <i>See Sweet and Maxwell's Diary, 1906.</i>	
Sweet and Maxwell's Diary for Lawyers for 1906 (ed. by Francis A. Stringer and J. Johnston)	116
Taswell-Langmead (T. P.).— <i>English Constitutional History</i> (6th ed. by P. A. Ashworth)	225
Terrell (Courtney).— <i>See Terrell (Thomas, K.C.).</i>	
Terrell (Thomas, K.C.).— <i>Law and Practice relating to Letters Patent for Inventions</i> (4th ed. by Courtney Terrell)	340
Theobald (J. Anwyll).— <i>See Maxwell on the Interpretation of Statutes.</i>	

	PAGE
Thwaites (Charles).—Guide to Criminal Law and Procedure (7th ed.)	351
Topham (Alfred Frank).— <i>See</i> Westlake (John, K.C.).	
Trade Disputes, Report of the Royal Commission on (n.)	117
Tudor's Charitable Trusts (4th ed. by L. S. Bristowe, Cecil A. Hunt, and Halford G. Burdett)	351
Turner (Morten).— <i>See</i> Yearly County Courts Practice, 1906.	
Underhay (F. G.).— <i>See</i> Kerly (D. M.).	
Underhill (Arthur).—Principles of the Law of Partnership (2nd ed.)	234
— <i>See</i> Encyclopaedia of Forms.	
Vaisey (Harry Bevir).— <i>See</i> Encyclopaedia of Forms.	
Valery (M. Jules).— <i>Traité de la Location des Coffres-Forts</i>	350
Van Hoytema (J. P. R.) and Raphaely (Siegfried).—Digest of Law Reports of the late South African Republic	462
Vecchio (Giorgio del).— <i>I presuppositi filosofici della nozione del diritto</i>	115
Voigtländer (S. F.).— <i>See</i> Dernstedt (M.).	
Walker (R. A.) and Farran (E. C.).—Law relating to Land Purchase in Ireland	346
Ward (D.).—Practice at Parliamentary Elections (3rd ed. by S. G. Lushington, assisted by F. G. Coltman)	236
West (Leonard H.) and Scott (S. B.).—Kelly's Draftsman (5th ed.) . .	350
Westlake (John, K.C.), assisted by Topham (Alfred Frank).—A Treatise on Private International Law (4th ed.)	93
White (Sir C. Arnold).— <i>See</i> Yearly Supreme Court Practice, 1906.	
Williams (James).—Dante as a Jurist	349
Williams (Joshua).—Principles of the Law of Real Property (20th ed. by T. Cyprian Williams)	332
Williams (T. Cyprian), assisted by Iselin (J. F.).—Treatise on the Law relating to Sale of Real Estate and Chattels Real	330
— <i>See</i> Williams (Joshua).	
Wilshere (A. M.).—Elements of Criminal Law and Procedure	234
— <i>See</i> Outlines of Evidence and Procedure in an action in the K. B. D.	351
Wolstenholme's Conveyancing and Settled Land Acts (9th ed. by B. L. Cherry and A. E. Russell)	105
Year Books of Edward II.—Vol. III (ed. by F. W. Maitland)	222
—III, years XVIII & XIX.—(Ed. and translated by Luke Owen Pike)	222
Yearly County Courts Practice, 1906, by G. Pitt-Lewis, K.C., and Sir C. Arnold White (1906, ed. by His Honour Judge Woodfall and E. H. Tindal Atkinson, assisted by Willoughby Jardine and Morten Turner)	116
Yearly Digest, 1905.—(Ed. by G. R. Hill)	230
Yearly Supreme Court Practice, 1906 (ed. by M. Muir Mackenzie, T. Willes Chitty, S. G. Lushington, and J. C. Fox, assisted by P. M. Francke, E. Church Bliss and William W. Lucas)	107
Zocco-Rosa (Antonio).— <i>L'Ius Papirianum da Glück ad Hirschfeld</i> . .	112

TABLE OF CASES, 1906.

[*This table includes only recent cases specially noted or discussed.*]

- | | |
|---|--|
| <p> Aiken <i>v.</i> Wisconsin, 118.
 Alfred Melson & Co., Lim., <i>Re</i>, 242.
 Allen <i>v.</i> Flood, 117.
 Armitage <i>v.</i> Att.-Gen., 240.
 Automatic Self-cleansing Filter Syn-
 dicate Co. <i>v.</i> Cuninghame, 357.
 Bater <i>v.</i> Bater, 239, 240.
 Behrens <i>v.</i> Richards, 11.
 Bisgood <i>v.</i> Nile Valley Co., 243.
 Bomore Road, No. 9, <i>Re</i>, 125.
 Bonnard <i>v.</i> Dott, 241.
 Bourne, <i>Re</i>, 125.
 Cavalier <i>v.</i> Pope, 7.
 Chic, Lim., <i>Re</i>, 242.
 Clough <i>v.</i> Samuel, 5.
 Constantinidi <i>v.</i> Constantinidi &
 Lance, 7.
 Crigglestone Coal Co., <i>Re</i>, 242.
 De Beers Consolidated Mines, Ltd.
 <i>v.</i> Howe, 7.
 Elliott <i>v.</i> Crutchley, 122.
 Ellis <i>v.</i> Horace Marshall & Son,
 244.
 Fickus, <i>Re</i>, 8.
 Fuller <i>v.</i> White Feather Reward,
 Lim., 243.
 Galbraith <i>v.</i> Poynton, 3.
 Geisse <i>v.</i> Taylor, 11.
 General Accident Ass. Corp., <i>Re</i>,
 125.
 German Date Coffee Co., <i>Re</i>, 10.
 Glasdir Copper Mines, Lim., <i>Re</i>, 123.
 Grainger <i>v.</i> Gough, 7.
 Gregory <i>v.</i> Duke of Brunswick, 117.
 Haddock <i>v.</i> Haddock, 237. </p> | <p> Lamb, <i>Re</i>, 5.
 Lolley's Case, 239, 240.
 Loustalan <i>v.</i> Loustalan, 120.
 Macmillan & Co. <i>v.</i> Dent, 120.
 Manners <i>v.</i> St. David's Gold and
 Copper Mines, Lim., 243.
 Nisbet & Potts' Contract, 124.
 Pedlar <i>v.</i> Road Block Gold Mines of
 India, Lim., 10.
 Price, <i>Re</i>, 10.
 R. <i>v.</i> Hankey, 9.
 Richard Mills & Co., Lim., <i>Re</i>, 125.
 Risdon Iron and Locomotive Works
 <i>v.</i> Furness, 122.
 Ruben <i>v.</i> Great Fingall Consoli-
 dated, 356, 357.
 Rushmer <i>v.</i> Polsue & Alfieri, Lim.,
 124.
 Scarborough <i>v.</i> Cosgrove, 8.
 Sheffield Corporation <i>v.</i> Barclay, 4.
 Skinner & Co. <i>v.</i> Shew & Co., 118.
 Stackemann <i>v.</i> Paton, 244.
 Stephens <i>v.</i> Mysore Reefs Mining
 Co., 10.
 Taff Vale Ry. Co. <i>v.</i> Amalgamated
 Society of Railway Servants, 119.
 Tasker, <i>Re</i>, 9.
 Taylor's Agreement Trusts, <i>Re</i>, 125.
 Thellusson <i>v.</i> Viscount Valentia, 242.
 Torrens <i>v.</i> Walker, 358.
 Victorian Daylesford Syndicate <i>v.</i>
 Dott, 11.
 Westerman <i>v.</i> Schwab, 119.
 Williams <i>v.</i> Howarth, 6.
 Woodall <i>v.</i> Clifton, 8. </p> |
|---|--|

THE LAW QUARTERLY REVIEW.

No. LXXXV. January, 1906.

NOTES.

SINCE our last issue death has removed a very prominent member of the Ontario Bar in the person of Mr. Christopher Robinson, K.C., of Toronto, Canada. Apart from his professional eminence, it is perhaps seldom in any community that the death of a private citizen has been followed by such an outburst of appreciation for his general personal qualities as has followed that of Mr. Robinson. The resolutions of public bodies, and leading articles in the local papers representing every variety of political view, together with the accounts the latter give of the crowds which attended the funeral service, all bear witness to the extraordinary esteem in which he was held by the members of the community in which he passed his life.

Mr. Robinson belonged to an old United Empire Loyalist family, some few particulars of which may not be without interest. The first member of it to come to America was Christopher Robinson, private secretary to the Governor of Virginia, Sir William Berkeley, who continued to reside in that colony till his death in 1693. He was the son of John Robinson of Cleasby, Yorkshire, an elder brother of Dr. John Robinson, Bishop of Bristol, and afterwards of London, who was British Plenipotentiary at the Treaty of Utrecht, 1713. This Christopher Robinson was the grandfather of another Christopher who fought on the British side in the Revolutionary War, and at the peace removed with other loyalists to New Brunswick. In 1782, however, he came to Upper Canada with his family, and settled there. He was the father of Chief Justice Sir John Beverley Robinson, Bart., whose life has been recently written by his son Major-General C. W. Robinson, C.B., and who occupied in his lifetime, as all who are at all acquainted with the history of Upper Canada are aware, a unique position in that province. Christopher Robinson, of whom we now write, was

another son of his, and has worthily sustained the reputation of his father.

For many years Mr. Robinson had been acknowledged leader of the Bar of his native province, and it is not too much to say that during the last quarter of a century scarcely a single case of first-rate importance has been presented to the Courts of Ontario, or to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council on appeal from Ontario, in which Mr. Robinson has not appeared on one side or the other. He was also one of the British counsel on the Behring Sea Arbitration in 1893, and on the more recent Alaska Boundary dispute; and the value of his services on these two occasions met with emphatic recognition at the time. But it may truly be said of Mr. Robinson, as is recorded of the great Roman jurist Papinian, that his integrity and high moral principle were as remarkable as his eminence in law.

What impression he has left upon his contemporaries in the latter respect may be best indicated by a few extracts from the numerous local publications. Chief Justice Falconbridge, addressing the Bar the day after Mr. Robinson's death, is reported as saying: 'His career will furnish the right answer to those who have doubts whether it is possible to combine the position of a great advocate with that of a stainless Christian gentleman. He was the Chevalier Bayard of the Canadian Bar, *sans peur et sans reproche*.'

The Senate of his own University of Toronto, in the course of a resolution passed by them, say:—

'The words spoken in respect to his father, the late Sir John Beverley Robinson, by the distinguished lawyer who succeeded him in the position of Chancellor of Trinity University, may well be applied to the son: "In every relation of life he was pre-eminent. His sweetness of temper, his gentleness of manner, and his courtesy were proverbial." Blameless in private life and loved by all who knew him, he was in his professional life a man of stainless integrity.'

The Canadian Churchman writes: 'England had her Sir Philip Sidney; France her Chevalier Bayard; and Canada has had her Christopher Robinson.'

Finally, as one sample of the way in which the Toronto daily papers spoke of him after his death, although he was not a man who ever courted public favour or held public office, we will cite an extract from the Toronto Globe:—'He attained the unquestionable leadership of the Bar through purely intellectual qualities, combined with an absolutely stainless sense of honour and duty that entitled him to be regarded as the Bayard of the profession in Canada. . . .

He was of a type of gentleman always too scarce, and in the belief of many fast becoming extinct. We have no desire to give countenance to so hopeless a view, however. Let us believe rather that the professions, as well as private and public life, may always be able to point to their men of pure and irreproachable life—to their Christopher Robinsons.'

This REVIEW does not profess to deal as a rule with current legal intelligence; but Lord Lindley's retirement after thirty years of judicial service must not pass without mention. Lord Lindley has given us an almost unique example in our time of the highest distinction in the profession being attained by purely professional merit and without any kind of aid from political influence or claims on any party in the State. We are sure that but few of us could say offhand what Lord Lindley's political opinions are; we doubt whether he has ever given any one the right to speak of them in public. Not that we can object to political promotions when they happen, as in the case of at least one of Lord Lindley's colleagues, to light on exactly the right man. Still, Lord Lindley's way is the most excellent from a lawyer's point of view. The younger generation may be reminded that his first published work was of a severely theoretical character. Traces of it may be found in his standard treatises on Partnership and Companies. 'That young man will never get business' was probably the comment, half a century ago, of any rule-of-thumb practitioner who cast an eye on the 'Introduction to the Study of Jurisprudence.'

The association of the 'hearth' with the permanent ownership or occupation of land as indicated in the note to *Galbraith v. Poynton* [1905] 2 K. B. 258, 259 (explaining the term 'a tenement of Old Auster' at Chew Magna) has at least its analogue, if not its possible origin, in the ancient laws of Wales. The reference in those laws to the *pen-tan-faen* or fireback-stone is frequent. Thus 'the preservation of the records of fireback-stones, meerstones and mounting stones (*meini-pentan a therfynfain ac esgynfain*) has been committed to bards duly qualified' (Cyfreithiau Cymru, xiii, § 97); 'three things preserve a memorial of land and homestead; a fireback-stone (*pentan-faen*) &c.' (ibid. § 99); 'there are three dead witnesses as to land . . . thirdly, the fireback-stone of the father, grandfather or great-grandfather of the demandant' (*a thrydydd, pentanfaen tad y gofynwr neu un ei hendad neu un ei orhendad*), ibid. § 227; 'there are three indispensables of a *taeog* [*villanus*]; a fireback (*pentan*) . . . &c.' (ibid. § 240). See also *Leges Wallicæ*, lib. ii; cap. viii. § 49; cap. xxxvi. § 31; cap. l. § 1; where the stone is called 'lapis focarius.'

In reference to this subject Aneurin Owen, the editor of the Welsh Laws, wrote, 'the fire being on the hearth, a large and durable stone was selected for the purpose; and a similar one for a back-stone (*pen-tan-faen*) which generally would outlast the destruction of a fragile building, and being pointed out would be proof that a claimant's ancestors formerly resided there.'

To the authorities cited in the reporter's note add—'Hastre, the hertstone [i.e. hearthstone]' in Bibblesworth's Glossary, ap. Wright Voc. 170.
J. G. W.

The reversal by the Law Lords of the decision of the Court of Appeal in *Sheffield Corporation v. Barclay* ([1905] A. C. 392, 74 L. J. K. B. 747) is extremely disconcerting to those who have followed the current of decision in this class of cases. Two trustees, *A* and *B*, have stock of the Sheffield Corporation, to the amount of £8,200, standing in their names. *A* executes a transfer of the stock to Barclay & Co. Lim., the well-known bankers, to secure an advance, forging *B*'s name; the bank sends in the transfer to the Corporation for registration, and the Corporation registers the bank as holder of the stock. Eight years later the forgery is discovered and *B*, the innocent trustee, calls on the Corporation to reinstate him as holder of the £8,200 stock, and the Corporation, having wrongfully transferred the stock, has no option but to do so, buying stock for the purpose. But having done that, the Corporation turns upon the bank, and says, 'You must indemnify the Corporation. You brought it a forged transfer, and the Corporation innocently registered it. You ought to bear the loss.' This view the Court of Appeal declined to accept—holding that the bank's sending in the transfer for registration imported no warranty of the genuineness of the transfer, and amounted merely to calling on the Corporation to perform its statutory obligation (substantially the same as a company's under the Companies Act) to register the transferee and issue him a certificate of title, subject of course to any inquiries which the Corporation might think proper to make with regard to the genuineness of the transfer. Now we have the House of Lords setting aside this view and adopting the following test: 'Here is a balance of equities: one of two innocent persons must suffer by a fraud: which of them had the better means of finding out the fraud—Corporation or Bank?' And the answer they give is in favour of the Corporation. The transferor was a customer of the bank—was borrowing from it—and the bank had the better opportunity of finding out whether the transfer was genuine or not. The decision thus really turns on the special facts of the case more than on any general principles. The strange thing is that the Law Lords speak

throughout of the Corporation acting 'ministerially' in registering the transfer, as though a company were not the guardian of its register of members. No doubt in practice—owing to the rarity of fraud—registration of transfers tends to become an automatic process, but in theory a company is bound to exercise an active supervision to keep its register correct, and properly drawn articles always empower the company on the tender of a transfer for registration to require what evidence it thinks fit of the transferor's title. If the ministerial view of a company's duty in regard to its register is to prevail it will lead to great laxity on the part of companies.

E. M.

The Legislature has provided many pretty puzzles for the Courts, and one of them is the much-vexed clause (h) of s. 4 of the Bankruptcy Act, 1883, making it an act of bankruptcy by a debtor if he 'gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.' The origin of this new act of bankruptcy was that, prior to 1883, a trader often sent out a notice saying that he was about to suspend payment, and then—the notice notwithstanding—entered into some dealing with one or more of his creditors which was unfair to the rest. By making the notice an act of bankruptcy, the title of the trustee related back to it and undid these intermediate transactions in fraud of the general body of creditors. This was the policy of the clause; but clauses defining acts of bankruptcy have to be strictly construed, because they entail disabilities and often penal consequences. This made the difficulty in *Clough v. Samuel* ([1905] A. C. 442, 74 L. J. K. B. 918). What the debtor there had done was to tell some of his principal creditors, who were members of the Stock Exchange, that he was in difficulties and could not meet his engagements, and that they might close their accounts at once so as to diminish the loss as much as possible. In fact, the debtor was hopelessly insolvent, and if the test in such cases is, as Bowen L. J. held in *Re Lamb* (4 Morr. 25, 32), what would an ordinary man of business, receiving such a notice, conclude from it under the circumstances, then certainly the debtor had committed an act of bankruptcy; but after Lord Halsbury's opinion in *Clough v. Samuel* that test can hardly be maintained. The true test is, not what creditors may infer, but what the debtor has done, and so reading the section Lord Halsbury and Lord Robertson held that the debtor had never given notice that he had suspended, or was about to suspend, payment of his debts. Weighty as Lord Macnaghten's dissenting opinion is, it shifts the point of view from the strict construction of the clause to the standpoint of public policy.

One or two ingenious publicists have ascribed more constitutional importance to the judgment of the Judicial Committee in *Williams v. Howarth* [1905] A. C. 551, 74 L. J. P. C. 115, than in our opinion really belongs to it. The plaintiff in the cause below was a volunteer from New South Wales in the South African war engaged by his own Government at the rate of 10s. a day. During his active service he received Imperial pay at the rate of 4s. 6d. a day. The Supreme Court of New South Wales held that this 4s. 6d. was not a satisfaction *pro tanto* of the 10s. for which he had bargained, but something outside the contract, unless it could be shown affirmatively that the Imperial Government paid it on behalf of the Colonial Government. The Judicial Committee reversed this decision, holding that the service was the King's service, and the persons in authority who paid or undertook to pay the plaintiff were alike the King's agents; and it made no difference (we must understand) that some agent in New South Wales was, under the local law and practice, liable to be sued in an ordinary action. In common justice it seems obvious that nobody intended the plaintiff to have more than 10s. a day, and that his claim was an attempt to take advantage of a technicality. Nor does there seem to be any great difficulty in making the law support the justice of the case. The service for which the plaintiff volunteered was that of the Empire, not that of New South Wales in particular; though it is true there is, at present, no satisfactory legal form of expressing the equally certain fact that it was also not any particular service of the United Kingdom. If the service, or any of it, had really been 'rendered in this Colony,' i. e. New South Wales, as supposed by the Court below, the question would have been different. As it was, there was only one service for the whole British army in South Africa, colonial contingents and all, and there was no reason whatever to presume that the Colonial Government bound itself for payment by any particular hand or out of any particular fund. No doubt the credit of the Colony was pledged to payment in full somehow; but there was no separate colonial service at all. The decision, therefore, does not in any way solve or prejudge the difficult theoretical questions which may possibly arise in matters where the King is confronted with himself, so to speak, as general nominal owner both of national or rather imperial property and of all that belongs to Commonwealth or Dominion, State or Province, and as representative of all these distinct interests. What we may be pretty sure of is that the Judicial Committee will not allow substantial justice, even in a more troublesome case than the present, to be defeated by any amount of speculative ingenuity.

The broad result of *De Beers Consolidated Mines Ltd. v. Howe* [1905] 2 K. B. 612, 74 L. J. K. B. 934, C. A., is this: No company which in reality is managed in England or in reality makes the whole of its profits from transactions in England can escape taxation on those profits under the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 2, sched. D. The Court will look wholly to the real facts of each case. That a company is incorporated and registered under the law of a foreign country, that its head office is nominally in that country, and that the work of the company, e.g. obtaining diamonds from mines, is in a foreign country, will not suffice to exempt it from income tax if its management be really carried on in England, and its gains really result from transactions in England. This way of disposing of nice legal questions by looking to the facts of each particular case is characteristic of our Courts, but it sometimes leads to a certain neglect of real though fine legal problems. One may be allowed to doubt whether at bottom *De Beers Consolidated Mines Ltd. v. Howe* is quite consistent with *Grainger v. Gough* [1896] A. C. 325. It is a little difficult to see why profits obtainable by a foreign firm from English customers as a result of canvassing in England for orders were not assessable to income tax as profits of a trade exercised or carried on in England.

Constantinidi v. Constantinidi & Lance [1905] P. 253, 74 L. J. P. 122, C. A. illustrates the width and the beneficial character of the discretion left to the Divorce Court in varying settlements so as to do justice between the divorced parties. In this instance neither husband nor wife could command the sympathy of any moralist, but it appeared that the husband, whose conduct was flagrantly immoral, was trying in effect to retain a comfortable income for himself out of his divorced wife's property. There were no children. The Court refused to give the husband an advantage which would have been opposed to the interest of public morality and of decency.

The landlord of a weekly tenant, not being bound to repair, agrees to repair the floor of the house in consideration of the tenant not giving notice to quit. Some time passes without anything being done, and the tenant's wife suffers personal injury from her chair going through a hole in the floor. Has she a separate right of action? Not in contract, it is conceded. Not in tort on the ground of invitation, say the majority of the Court of Appeal, for she knew the state of the floor, and the defendant had not possession or control of the tenement; nor on the ground of deceit, for there was no misrepresentation of fact: *Cavalier v. Pope* [1905] 2 K. B. 757, 74 L. J. K. B. 857, per Collins M. R.

and Romer L.J. *diss.* Mathew L.J. The dissenting judgment ingeniously suggests, as an inference of fact, that the defendant's promise to repair was made without any intention of performing it. This, if established, would no doubt make the contract fraudulent as against the husband and voidable at his option: but in fact the husband sued on the contract and recovered damages. In any case, would even this amount to an actionable deceit as against every other inmate of the house who might suffer from the repairs not being done? for it seems the argument must go that length. The Lord Justice's reasons go dangerously near an attempt to revive the supposed equitable doctrine of 'making representations good,' which is now thoroughly exploded: *Re Fickus* [1900] 1 Ch. 331, 69 L. J. Ch. 161. It was a rather hard case, but we think a contrary decision would have made bad law.

In *Woodall v. Clifton* [1905] 2 Ch. 257, 74 L. J. Ch. 555, the Court of Appeal decided a rather neat conveyancing point. A covenant or proviso in a lease giving the lessee an option of purchasing the reversion upon stated conditions at any time during the term is not within the statute of Henry VIII, and the burden of it does not run with the reversion. The reason is that, being 'in reality not a covenant concerning the tenancy or its terms,' it does not 'touch or affect the land demised.' Although the result of the option, if exercised, may be to destroy the tenancy, it is in itself outside the relation of landlord and tenant, and does not concern the land so far as it is the subject-matter of the lease. A contrary decision would, as the Court said, lead to troublesome questions about perpetuities and otherwise. The way of escape which the Court has provided is both astute and elegant.

There is no such rule of law as that a boarding-house keeper is under no duty to take care of his boarder's goods unless they are handed to him for safe custody. So much, at all events, is decided by the Court of Appeal in *Scarborough v. Cosgrove* [1905] 2 K. B. 805, 74 L. J. K. B. 892, and the result appears to be good sense. As to what is affirmatively the boarding-house keeper's duty, there seems to be a choice between holding that it is an implied term of the contract that he shall take ordinary care of a paying guest's goods in his custody (Collins M. R. and Mathew L. J.), and preferring to lay down a general duty to conduct the business in a reasonable manner, which must be interpreted in every case, be it loss of goods or other damage, according to the particular circumstances (Romer L. J.). The Court was unanimous in ordering a new trial. There is, of course, no question of any general common law duty resembling that of an innkeeper.

In the sphere of criminal procedure technicalities banished from other parts of English law drag on a lingering and noxious existence. The motor car case, *R. v. Hankey* [1905] 2 K. B. 687, 74 L. J. K. B. 922, illustrates the way in which formalism may obstruct justice. The Earl of Craven was convicted of unlawfully refusing to give the name and address of the person who was at a specified time driving his motor car, such name and address being required that proceedings might be taken against him under the Motor Car Act, 1903, s. 1, and Rule 6, Art. 4, of the Statutory Rules and Orders, 1904. Every one knew what in fact was the offence, and that there was no defence on the merits. The Court was most reluctant to quash the conviction, yet the Court was forced to quash it because the charge was not described with correctness. 'A conviction must be as certain in its allegations as an indictment.' The Court no doubt did its duty, but many persons will regret that it was the duty of the Court to let an offender go free.

A learned correspondent writes as follows:—

'The decision of the Court of Appeal in *Re Tasker* [1905] 2 Ch. 587, 74 L. J. Ch. 643, suggests too much *summum jus, summa injuria*. It not only defeats the title of a number of bona fide transferees for value of debentures, but it introduces a new risk which may well make people shy of investing in that class of security. The situation was this. The company had duly created £35,000 worth of registered debentures, and part of these it had issued to *A*, *B*, and *C*. Then, needing to borrow more, the company obtained loans from *D* and *E*, and issued to *D* and *E* debentures to twice the amount of their loans, together with blank transfers to enable them, if necessary, to realize their security. From time to time the company paid off part of the loans by *D* and *E*, and *D* and *E* on such occasions handed over to the company the debentures and the blank transfers, but no retransfer to the company was executed. In the meantime applications for debentures were made to the company by *X*, *Y*, and *Z*, and the company complied with them by filling in the transfers handed over by *D* and *E*, with the names of *X*, *Y*, and *Z*, and registering *X*, *Y*, and *Z* as debenture-holders. Then came the question—raised in a debenture-holders' action—whether *X*, *Y*, and *Z* were entitled to rank *pari passu* with *A*, *B*, and *C* against the property comprised in the security, and the Court of Appeal has held that they are not. The company on paying off *D* and *E*'s charge became equitable owner of the debentures, and as such could not—on the principle laid down by Lord Cranworth in *Otter v. Lord Vaux*—keep them alive or transfer them even to a bona fide holder for value without notice, so as to

give the transferees a title to rank with the other debenture-holders of the series *A*, *B*, and *C*. The company draftsman must now set himself to outmanœuvre this decision 'by conditions securing more effectually a quasi negotiability by estoppel.'

With great respect for our correspondent, we do not see what question of negotiability could arise on debentures expressly transferable only by writing and registration. We agree that an adequate remedy may be found in the resources of company draftsmen without calling on Parliament to tinker the Companies Acts once more, probably with ambiguous results.

It seems obvious that a debt not payable on demand—such as arises from a deposit with a banker subject to ten days' notice of withdrawal—is not within the description of 'ready money'; and indeed this was not treated as arguable on either principle or authority in *Re Price* [1905] 2 Ch. 55, 74 L. J. Ch. 437. The point of more substance in this case is that such a deposit is not made a 'pecuniary investment' merely by the fact that the bank allows some interest on the deposit.

There are two principles of public policy involved in the construction of a company's memorandum of association: one is that a company must be allowed a fair latitude in carrying on its business, that is, the *ultra vires* doctrine must be reasonably and not unreasonably applied. The other principle is that persons who have subscribed their money for one purpose ought not to be committed to a new scheme which they never contemplated engaging in. It was this latter consideration which dictated Lord Justice Lindley's ruling in the *German Date Coffee Company's* case (20 Ch. Div. 169). The subscribers there had paid their money to work an invention for manufacturing coffee—or a substitute for coffee—out of dates. The directors, finding that impracticable, proposed—under general words in the memorandum—to acquire another patent in another country for a similar purpose, and the Court would not allow it. This principle was emphasized by Swinfen Eady J. in *Stephens v. Mysore Reefs (Kangundy) Mining Co.* ([1902] 1 Ch. 745, 71 L. J. Ch. 295) where that learned judge while holding that it was proper to give a liberal construction to subsidiary paragraphs for the furtherance of the main object of the company, would not accept a construction which would virtually enable the company to carry on any business of any kind whatever. A somewhat similar question came lately before Warrington J. in *Pedlar v. Road Block Gold Mines of India, Lim.* ([1905] 2 Ch. 427, 74 L. J. Ch. 753). The first paragraph of the objects clause there empowered

the company to acquire and work a particular gold mine in Mysore, the second paragraph to acquire and work gold mines 'in Mysore or elsewhere.' The particular gold mine in Mysore proved impracticable, and the directors were proposing to acquire a gold mine in Bombay under the word 'elsewhere.' Warrington J. held that they were entitled to do so. This in no way conflicts with Swinfen Eady J.'s ruling. A company may have two or more different objects; there is nothing against it: only if the company has, the objects must be set out in reasonably clear language. A company cannot give itself a roving commission to go anywhere and do anything merely by stringing together a large number of general enabling clauses.

Since the Money-lenders Act, 1900, not only a money-lender cannot recover interest or charges of any kind which the Court thinks harsh and unconscionable, but a money-lender who neglects to register his name under the Act cannot recover anything at all, and in such a case the Court has no power to order payment of what it thinks fairly due. So Buckley J. has decided in *Victorian Daylesford Syndicate v. Dott* [1905] 2 Ch. 624, 74 L. J. Ch. 673. It was not uncommonly supposed, when the statute was new, that it would have little practical operation. If this decision is affirmed or acquiesced in, any such apprehension will be effectually removed.

The occupier of land can, as a matter of right, bring an action for any trespass, whether it does or does not cause any measurable damage, and whether it does or does not interfere with his reasonable use or enjoyment of the land. But he cannot therefore, as a matter of right, claim the remedy of an injunction. The Court puts forth its power only when substantial injury or annoyance would result from the repetition of the trespass: *Behrens v. Richards* [1905] 2 Ch. 614, 64 L. J. Ch. 515. A troublesome local controversy seems to have been reasonably settled by the order ultimately made in this case, which shows how much a judge can do in the course of the argument by the exercise of beneficent, if strictly extrajudicial, diplomacy.

Geisse v. Taylor [1905] 2 K. B. 658, 74 L. J. K. B. 912, illustrates the old saying that 'there is many a slip 'twixt the cup and the lip,' in other words it is one thing to attach a debt, and another to get payment of it. The judgment creditor in *Geisse v. Taylor* had obtained a garnishee order absolute attaching a debt due from a limited company to his judgment debtor, and had served the order on the company. The very next day the company executed a debenture to secure an advance, charging in the usual way its

undertaking, and all its property and assets, present and future, including its uncalled capital. It was certainly smart practice on the company's part to intercept in this way the garnishor's remedies against its property, and Kennedy J., not quite easy in his mind as to the conscionableness of it, cast about to see if there were not some equity discoverable in favour of the disappointed garnishor; but in vain. It is well settled that a garnishee order does not make the garnishor a secured creditor. It merely surrogates him to the original creditor's rights to enforce the debt against the garnishee—in this case, the company; but till he does so, by *fi. fa.* or other form of execution, there is nothing to prevent the garnishee dealing with the property available for payment of the debt in any way he chooses, e. g. charging it in favour of a debenture-holder. The lesson will be a useful one to creditors resorting to the remedy of attachment of debts. The hardship—if hardship there is—must be laid to the account of 'the floating charge.'

The recent codification of German civil law and the prospective revision of the French Civil Code have naturally bespoken much of the attention of those who are interested in the comparative study of legislation. Similar work is going on elsewhere, not less efficiently because more quietly. For some years the Civil Code of the Netherlands—founded, as we may presume that most of our readers know, on the Code Napoléon—has been under a systematic process of redrafting. Its French origin has not prevented the learned persons in charge from keeping an eye on German legislation with a view to adopting any improvements it might suggest. The procedure is careful and business-like; the draft brought before the Legislature by the Minister of Justice is founded on a report of the Raad van State (Conseil d'État—there is nothing very like this body in England), which is not necessarily a public document, but is generally communicated if asked for. This is without prejudice to further consideration by a select committee at a later stage. We have before us a specimen of the work already done on the title of the Code dealing with evidence and prescription, and we hope to report further when the project approaches completion.

The meeting of the American Bar Association for 1905 was held in August at Narragansett Pier, R. I. The President, Mr. Henry St. George Tucker, of Virginia, devoted his address to a review of state legislation. Five more States have adopted the Negotiable Instrument Law framed by the Commission for Uniformity of Laws. Motor cars have been regulated in several States, and the maximum speed fixed at rates varying from fifteen to twenty-five miles an

hour. Texas has made a laudable endeavour to put down the practice of carrying arms; whereby the New York tailor's question to the customer who orders a hip-pocket (*sicut dicitur*)—'Maine or Texas?'—may perhaps become a thing of the past. Habitual frauds committed by itinerant hawkers have moved North and South Dakota to pass statutes intended to make it impossible to give a negotiable instrument in payment for a lightning rod, a patent right, or, in North Dakota, a stallion or jackass. Massachusetts has taken drastic measures for the suppression of the 'gipsy' and 'brown-tail' moths—really dangerous enemies to trees. The powers conferred on the officer appointed for that purpose appear to go to the extreme of constitutional correctness. Generally there is a marked tendency to the increase of governmental control.

The relation of law schools and their degrees or diplomas to the conditions which are or ought to be required for admission to practice has been lately discussed by the Association of American Law Schools and the American Bar Association: *American Law School Review* (St. Paul, Minn.), November, 1905. The opinion expressed here by the Oxford Law Faculty and others ten years ago (*L. Q. R.* xii. 1), that theoretical and practical training should be separately provided for, and examination alone will not secure either, appears to be generally accepted. We hope to be able to report before long on the new scheme of the Law Society here, which marks a considerable advance on anything hitherto done in England.

The following papers in the newly issued vol. xix of the *Transactions of the Royal Historical Society* may be noted as interesting to lawyers: Dr. Baldwin, 'The beginnings of the King's Council'; Miss E. M. Leonard, 'The inclosure of common fields in the seventeenth century'; J. Neville Figgis, 'Bartolus and the development of European political ideas'; I. S. Leadam, 'Polydore Vergil in the English Law Courts' (information for dealing in bills of exchange without licence); H. E. Malden, 'Bondmen in Surrey under the Tudors.'

ERRATUM.

Vol. xxi (October number), p. 436, line 25 from bottom, for 'simple' read 'similar'.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

IS INTERNATIONAL LAW A PART OF THE LAW OF ENGLAND?

THE case of *West Rand Central Gold Mining Company v. Rex* was a petition of right, seeking the performance by the Crown, as successor to the South African Republic, of an obligation alleged to have rested on that republic for the repayment of the value of gold commandeered by it shortly before the commencement of the late war: [1905] 2 K. B. 391. The Attorney-General demurred and the demurrer was allowed. Among the points taken for the petitioners by Lord Robert Cecil, K.C., was this: 'Secondly, international law is part of the law of England.' The Court, composed of Lord Alverstone C.J., and Wills and Kennedy JJ., gave to that maxim an adhesion modified as follows: 'Any doctrine so invoked must,' they said, 'be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it;' p. 407. I now propose to examine further the nature and extent of the connexion between international law and the law of England, and, since *dolus latet in generalibus*, I must do it with what I hope may not prove wearisome detail.

At first sight it might be thought that no such connexion was possible. The law of England, in the sense in which it is contrasted with international law, consists of rules to be applied between the private parties who are suitors in the king's courts, including foreign states when they appear as plaintiffs claiming such rights as a private person might have, or between the king and the private parties who are amenable to his courts. International law consists of rules to be applied between states. How can a rule expressing rights and duties of states *inter se* be a part of a body of rules expressing rights and duties of private parties, whether *inter se* or between them and the king? The law of England is the law of the king's courts: a state is not amenable to those courts and is not commonly a suitor in them. If it is a suitor in them it thereby submits to their law, and, since the opposite party is always

a private one, how can any rule only existing between states find a place? Before attempting to bridge the chasm it will be well to clear away some considerations which are alien to the subject.

In the United Kingdom, possibly subject to exceptions which will be noticed in due place, a treaty has no effect on private rights: if the Crown concludes a treaty which is intended to divest or modify private rights, it must obtain an act of parliament to give it that operation. In the United States it is otherwise, for the sixth article of the constitution provides that 'all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.' Hence, when the ninth article of the Jay treaty in 1794 enabled the subjects of either country to hold lands in the other, and to sell and devise them as if they were natives, this stipulation at once took effect in the United States in favour of British subjects, repealing of itself so much either of common or of statute law on the disabilities of aliens as stood in its way, while on our side of the Atlantic an Act of 37 George III had to be and was passed in order to give effect to the stipulation in favour of citizens of the United States. This difference might seem to imply that the rule of international law requiring that treaties shall be observed was incorporated with the law of the United States though not with the law of England. But it is not so. The difference is merely that the executive possesses in the United States a power of making law by treaty not paralleled in England. That the faith of treaties is treated in the same way in the two countries is proved by the fact that as the treaties of the United States repeal their common law and their previous legislative acts, so they are in their turn repealed by subsequent acts of Congress, and the question whether such repeal was contrary to international good faith and law will not be entertained; a position firmly established by the decisions of the Supreme Court on claims to the benefit of customs conventions in spite of acts of Congress fixing duties. See *Whitney v. Robertson*, 124 U. S. 190, and *Scott's Cases on International Law*, 422, with the note on p. 426.

Again, in the case of the death caused within three miles of the English coast by the negligent navigation of the German ship *Franconia* (*Reg. v. Keyn*, 1876, 2 Ex. D. 63), it was discussed whether the definition by international law of the territorial extent of sovereignty could, of itself, give to the king's courts jurisdiction over the extent so defined; and there was a difference of opinion on the point. Among the majority, who gave judgment for the defendant, Sir Alexander Cockburn C.J. held that not

only was there no international law awarding sovereignty over the sea within the three-mile limit, but that, even if there had been, jurisdiction would not have been thereby given to the court, but an act of parliament would have been needed for the purpose. And Lush J. made that hypothetical case the actual one, holding that as between nation and nation the waters in question were British territory, but that for want of an act of parliament the court had no jurisdiction over them. On the other hand, Lord Coleridge C. J. held that the waters were part of the realm by the agreement of civilized nations, and that therefore British law had to be administered for them by some tribunal, which for the reasons he gave could only be the Central Criminal Court. The objection to international law as giving territorial jurisdiction to the king's courts prevailed in the case, and was got rid of for the future by the Territorial Waters Jurisdiction Act, 1878, which in substance gives to the king's courts jurisdiction over so much of the littoral sea 'as is deemed by international law to be within the territorial sovereignty of' the Crown, the same not being less than one marine league from low-water mark. But neither the denial nor the assertion of territorial jurisdiction as resulting from international law, nor again the conferring it by Parliament to the extent of international law, has any direct bearing on the question whether the king's courts, where their jurisdiction is admitted, must or can apply rules of international law to the decision of the matter before them.

The chasm which separates international law from the law of England or of any other country—in other words, rules to be applied between states from rules to be applied between or to private parties, including a foreign state when plaintiff—begins to be bridged when a situation exists between states which is regulated as between them by international law, and thereby state *A* has against state *B* a right not practically realizable without the assistance of the courts of the latter, such right belonging to *A* either for its collective benefit or as trustee for or protector of its subjects who are to enjoy it. The simplest case will be that where the right is such that state *A* can itself sue for it, and then the courts of *B* must either give judgment on the question of international law under which the right is claimed, as being at least *pro hac vice* a question of the law of their land, or declare themselves incompetent to apply the international law, and thereby probably expose their sovereign to much diplomatic inconvenience. But more commonly private persons are so concerned in the situation that the court has to apply its law, whatever that may be, between or to them. Such cases are presented by diplomatic immunities, where the action of a private party may infringe an immunity which the

state represented has the right to claim for its servants from the state in which it is represented; by the neutrality of its territory which a neutral state owes to a belligerent one, but which may be infringed by the conduct of a private party within the territory; by rights belonging to a state for the benefit of its subjects, in the enjoyment of which it may protect them when they are infringed by the state against which they exist; and so forth, for the enumeration is not pretended to be exhaustive. In all such cases, if the rights or conduct of a private party were judged by the king's courts without reference to the international rule brought into play between him and a foreign state, the sovereign would be without the means of covering his responsibility to that foreign state.

This principle was recognized in England as early as the reign of Queen Anne, when the persons concerned in the arrest of the Tsar's ambassador, which led to the well-known Act of Parliament, were tried for a misdemeanour, on an information filed by the Attorney-General, 'as infractors of the law of nations': the expression is Lord Mansfield's, in *Triquet v. Bath*, 3 Burr. 1480. They were found guilty, but never brought up for judgment, because, as Lord Mansfield said, 'such a sentence as the court could have given he [the Tsar] might have thought a fresh insult.' It was recognized again in *Barbuit's* case (sometimes referred to as *Buvot v. Barbuit*) in Hilary Term, 1737; reported in Forrester's Cases temp. Talbot, 281, and a further account of it given by Lord Mansfield, who was counsel in it, in *Triquet v. Bath*, u.s. The point was whether a person officially described as 'agent of commerce from the King of Prussia in Great Britain,' an employment which Lord Talbot pronounced to be in the nature of that of a consul, was entitled to diplomatic immunities. 'Lord Talbot,' says Lord Mansfield, 'declared a clear opinion "that the law of nations, in its full extent, was part of the law of England," and "that the law of nations was to be collected from the practice of different nations and the authority of writers." Accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wicquefort, &c., there being no English writer of eminence upon the subject¹.' Now what is remarkable in this case is that although Talbot declined to discharge the agent of commerce, who had been attached for non-payment of what had been found due from him in a chancery suit, the British Government paid the amount and so obtained his discharge. Such a compliance may be attributed in part to

¹ See also *Heathfield v. Clinton* (1767) 4 Burr. 2015, in which Lord Mansfield said: 'The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England.'

a desire to maintain good relations with the King of Prussia, but that the case was not then thought to be clear on the law of nations, although now it would be so, results as well from the Prussian demand as at least in some degree also from the British compliance. Therefore it was not possible for Lord Talbot to limit his view of the law of nations to what had been 'really accepted as binding between nations,' or even to what had been 'so widely and generally accepted that it could hardly be supposed that any civilized state would repudiate it.' As chancellor, he was the principal constitutional adviser of the king in council as to the line which the king could justly maintain in such matters as against a fellow sovereign, and at the same time the head of the law, bound so to interpret the law of the land as to give the king all needful support in maintaining that line. And this he was to do in face of an actual international difference, therefore without ignoring contemporary opinion. That Lord Talbot so understood his duty appears from his quoting Barbeyrac and Bynkershoek, names clothed to us with a venerable antiquity, but of whom Bynkershoek was still living, and Barbeyrac had died in middle age scarcely eight years before. So too, in *Viveash v. Becker*, 1814, 3 M. & S. 284, 15 R. R. 488—where the point whether a consul is entitled to diplomatic immunities again came up, with the further question whether, in case of the affirmative, such immunities extend to a subject of the state in which he is appointed to act—Lord Ellenborough relied on Vattel, from the publication of whose great work fewer years separated him than separate us from the treatise on the Law of Domicile of Sir Robert Phillimore, whom we have scarcely ceased to regard as a contemporary.

How the principle may be called into play in questions relating to neutrality is illustrated by *Gideon Henfield's* case; Wharton's State Trials of the United States, p. 49. He was a citizen of the United States who had accepted a French commission in a privateer, herself equipped and commissioned in violation of American neutrality, and had taken part under it in the capture of a British ship. He was indicted in 1793 in the Federal Circuit Court, and acquitted, probably as the result of political feeling; an occurrence which led to the enactment of the first of the United States neutrality laws. It became a subject of much discussion whether the federal jurisdiction was the right one in which to try him, having regard to the fact that no act of Congress had up to that time declared it to be so, but no doubt has been expressed about the law. Both Chief Justice Jay, who delivered to the grand jury of the district of Virginia a charge carefully prepared as an introduction to the class of cases in question, and Wilson J., who

presided at the trial of the particular case in the district of Pennsylvania, were clearly of opinion that conduct which Great Britain might justly resent as a breach of the peace towards her was an infraction of the common law. And it must be noted that the fact of infraction depended on the duties of neutrals, a part of international law which has been the subject of great development, probably not even yet complete, so that the international responsibility of a government for the breach of neutral duties by its subjects would not be covered by the judgments of its courts if they did not take account of the law of neutrality in its latest form.

The third class of cases, mentioned above as presenting a situation existing between states in which private parties are concerned, was that in which a state holds rights for the benefit of its subjects, and therefore has the duty of protecting them in the enjoyment of those rights. An example is furnished by a right of fishery in territorial waters conceded by treaty to a foreign power. Often rights so conceded cannot be enjoyed without divesting or modifying private rights previously existing, and then the general rule of the British constitution already noticed, that only an act of parliament can give that effect to a treaty, will apply. Thus in *Walker v. Baird* [1892] A. C. 491, the Attorney-General, as counsel for the appellants, admitted that the Crown cannot sanction an invasion of the rights of private persons by its officers *whenever* (the italics are mine) it is necessary in order to compel obedience to a treaty, and the Judicial Committee did not think that the occasion arose for considering the exceptions proposed, namely treaties of peace or treaties terminating such international differences as to be in the nature of treaties of peace. When the general constitutional rule applies the king's courts cannot act on the treaty till Parliament intervenes in support of it, and the king will usually have limited his liability under the treaty to doing his best to obtain such intervention. When it may not apply, either by virtue of an exception or because those in trust for whom a right is held by a foreign state can enjoy it without infringing any previous right, the king's courts are certainly bound to cover his responsibility by deciding that what such parties are entitled to under international law they are equally entitled to under the law of England.

The class of cases now under consideration may include rights held by a state for the benefit of its subjects under a rule of international law as well as those so held under a treaty; and here we come to close quarters with the question whether the Crown, as successor to the South African Republic, is under an obligation,

enforceable by petition of right, to fulfil the liability of that republic for the value of gold commandeered by it. When it is asked with reference to that question whether international law is part of the law of England, it is assumed that the international obligation exists; in other words, that a foreign state can claim from the British Crown the repayment of any part of the gold which may have belonged to one of its subjects. Assuming then, for the present, that this is so, it seems reasonable that British subjects, seeking the fulfilment of that obligation by petition of right, should not be worse off than aliens having a state to undertake their case. The answer made is that a petition of right will not lie, because the annexation by which it is contended that the Crown became successor to the conquered government was an act of state, and acts of state cannot be inquired into either by judicial or quasi-judicial proceedings. That answer does not preclude the Crown from examining the alleged succession by the light of other advisers than the judges, and it may be presumed that if such an examination led to the conclusion that the international obligation existed, the Crown would feel itself bound in conscience to do the same justice to British subjects which in that event it would have to do to a foreigner who claimed it. The answer, however, is irrelevant to the question whether international law is a part of the law of England. It merely sets up a constitutional rule by which the law of the land, whether including international law or not, is excluded, even in the mild form of a petition of right, from having a voice with regard to certain matters described as acts of state. Here then we might leave this branch of our subject, so far as the question which stands at the head of this article is concerned; but the importance of it may warrant some remarks on acts of state.

It is one thing to question the validity of an act of state, and another thing to admit its validity and draw its consequences. An annexation is an act of state, and if it be unattended by any further manifestation of the will of the Crown it will remain open, barring such a constitutional rule as has been asserted, to consider whether, and within what limits, the Crown is made by force of it the successor to the obligations as well as to the rights of the displaced government. Such consideration will not call the annexation in question. But the Crown may manifest its will, either by declaration or in some other unmistakable manner, that it will not recognize any or some of the obligations of the displaced government; and this will be a second, although perhaps contemporaneous, act of state, distinct from the annexation. If it does so, the Crown must face any international consequences of its

action; but as far as the English judges are concerned, even when sitting only on a petition of right, no constitutional lawyer can doubt that they will be bound by it. The Crown is the supreme organ for international affairs, and the judges can no more question its action in them than they can question the action of Parliament in matters of legislation¹. But the reported cases on the respect due to acts of state have not always taken note of the distinctions which may be drawn on them. In *Nabob of the Carnatic v. East India Company*, 1 Ves. Jun. 371 (Thurlow L.C.) and 2 Ves. Jun. 56 (Lord Commissioner Eyre), the bill was for an account of transactions which took place under agreements between an Indian sovereign and the East India Company, the latter in its political character as was ultimately held. The final agreement of the Nabob, the Lord Commissioner said, 'was entered into with them [the company], not as subjects, but as a neighbouring independent state, and is the same as if it was a treaty between two sovereigns, and consequently is not a subject of private municipal jurisdiction.' That, as between the two sovereigns, is beyond controversy. To deny it would involve the consequence that if a treaty of peace stipulated the payment of a sum of money by one sovereign to another, the latter might sue the former for the amount in a court of justice—*quod est absurdum*. In *Secretary of State v. Kamachee*, 13 Moo. P.C. 22, the facts were that the company, acting as a sovereign power, had seized the raj of Tanjore and the property of the deceased rajah, as an escheat; and the action was brought by one who claimed that a part of what was so seized was private property of the deceased and ought to descend to his private heirs. But by a series of public acts the competent British executive authority had manifested in the clearest manner its determination to reserve the decision on that point to itself. There were thus what must be distinguished as two acts of state, one the simple

¹ This is the doctrine laid down by Lord Mansfield in *Campbell v. Hall*, 1 Cowp. 204, at p. 209, in language quoted by their lordships in *West Rand Central Gold Mining Company v. Rex*, at p. 406. 'It is left by the constitution to the king's authority to grant or refuse a capitulation. . . . If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it on what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.' But their lordships were scarcely correct when they said that that language was inconsistent with the opinions of Huber and some other writers on the international law of conquest, for Lord Mansfield limited himself to the constitutional question, expressing on the international one no opinion, and therefore none inconsistent with any opinion of any one. The dispute was whether the laws of a conquered country could be altered by 'the king without the concurrence of parliament.' Mansfield decided that they could, and said, in words governing the interpretation of the passage quoted, 'when I say "the king," I always mean "the king without the concurrence of parliament."' "

annexation of the raj, the other the dealing with the question of property; and the Judicial Committee, in their judgment dismissing the action, which was delivered by Lord Kingsdown, based themselves on the latter. 'If the company,' they said, 'in the exercise of their sovereign power, have thought fit to seize the whole property of the late rajah, private as well as public, does that circumstance give any jurisdiction over their acts to the court at Madras?' Thus the case gave an instance of obeying the constitutional rule that a British act of state cannot be questioned by a British court, but no instance of refusing, as between the government and a private party, to draw from an act of state the consequences left open by it. *Doss v. Secretary of State*, L. R. 19 Eq. 509, was a bill claiming a charge on the revenue of the territory of Oude, which had been annexed by the East India Company, for the amount of the debts due from the dethroned king of Oude to the plaintiffs. It came before Malins V.C., and it will probably be thought that the grounds which he gave for sustaining the demurrer, other than the one which concerns us here, were sufficient. He did, however, treat the reply of 'act of state' as being fatal to the bill, and since it does not appear that there had been any act of state in the case other than the simple annexation, we here meet for the first time with a refusal by a court to draw the consequences of an act of state. As regards the international point, Lord Derby, then Lord Stanley and President of the Board of Control, stated in the House of Commons on July 5, 1858, 'that the transfer of the revenues of the kingdom of Oude to Great Britain did carry with it a liability for such debts of the former government as were fairly and justly contracted': quoted by Malins V.C., L. R. 19 Eq., p. 531. The law laid down by Vice-Chancellor Malins was applied by the Judicial Committee, their judgment being delivered by Lord Chancellor Halsbury, in *Cook v. Sprigg* [1899] A.C. 572. There it was sought to enforce concessions granted by Sigcau, described as paramount chief of Pondoland, before the annexation of that country; but the doctrine in question was again far from being a necessary basis for the refusal, since, besides that it would be a joke to apply principles of international law to the concessions which white men wheedle or extort from uncivilized chiefs, it must be remarked that some of the rights said to have been conceded were of that public nature which an annexing state is always held free to deal with on its own and not on its predecessor's principles of policy. And now we have the judges in *West Rand Central Gold Mining Company v. Rex* holding 'that matters which fall properly to be determined by the Crown by treaty or as an act of state are not subject to the jurisdiction of the muni-

cial courts, and that rights supposed to be acquired thereunder cannot be enforced by such courts¹. This being treated by them as a sufficient ground for allowing the demurrer, when nothing beyond the simple annexation of the Transvaal appeared as having been done on the part of the Crown, the law of England must be admitted, in the present state of the authorities, to deny the right of the judges, even on a petition of right, to draw out against the Crown the consequences of an act of state.

It needs scarcely be said that in the United States no such difficulty as that which we have been considering occurs. The constitutional position of the Supreme Court, and the very purpose for which it exists, on the one hand prevent it from questioning any act of state performed by the executive within its lawful powers, and on the other hand require it to draw out the consequences of any such act of state and apply them to the cases before it. When therefore a conquest made by the United States or a cession made to them is presented to the consideration of that court, it is free to apply any rule of international law which it finds relating to the situation, and it applies such rule not only between private parties but also between a private party and the republic, so far as the republic has not decided the matter by the constitutional action of its executive. In *United States v. Percheman*, 7 Peters 51, one of a series of cases arising out of the acquisition of Florida and Louisiana by cession, Chief Justice Marshall said (p. 86):—

‘It is very unusual even in cases of conquest for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled.’

Particular attention must be drawn to the last words, because the Court in *West Rand Central Gold Mining Co. v. Rex*, advertent to the fact that in the series of cases mentioned the rules of international law

¹ This ([1905] 2 K. B. 409) is the language in which their lordships sum up the previous authorities, and they clearly adopt it. One of the cases which they quote is that of *Rustomjee v. Reg.* 1 Q. B. D. 487 and 2 Q. B. D. 69, where the British government had received from the Chinese government a sum of money in respect of claims made on the latter by certain persons, of whom one presented a petition of right in order to enforce payment of his claim out of the sum so received. Lord Coleridge said that ‘as in making the treaty, so in performing the treaty, the Queen is beyond the control of municipal law.’ It must be observed that the circumstances of a treaty may contain in themselves sufficient proof that the sovereign intended to reserve his own discretion in executing it. For instance, if every such claimant as the petitioner in *Rustomjee v. Reg.* could succeed separately, the total awarded might possibly exceed the amount received by the Crown. Justice would require an administration of the fund, for which the law as to petitions of right makes no provision.

had only been enforced with regard to property locally situated in an annexed country, observed that the language used in them must be construed solely with reference to that contingency. It is no doubt true that the language which falls from many judges must be construed solely with reference to the cases before them, but the words selected by a man like Chief Justice Marshall for the purpose of expressing the principle on which he acted cannot be so treated, and his mention of conquest as not annulling either private property or private rights must be understood in all the breadth he gave to it¹.

Still another example of a situation existing between two states at peace with one another, and regulated as between them by a rule of international law, being brought before a national court through a private person's being concerned in it, is furnished by the operation of prize courts as between belligerents and neutrals. Those courts sit under national authority and must obey the determinations of the constitutional national authority. Whether or not, for instance, Lord Stowell considered the Orders in Council during the Napoleonic wars to be justifiable as measures of retorsion against the Continental System, the Orders were acts of state and he had no choice but to apply them. Consequently, for the purpose of the inquiry how far international law is a part of the law of England, a British prize court stands on the same footing as the High Court or the judges to whom a petition of right is referred; and that

¹ Although the judges in *West Rand Central Gold Mining Company v. Rex* held that their decision was made necessary by a British rule excluding any rule of international law, they attacked the rule of the latter kind which was alleged, and to discuss it would not be within the scope of this article. It can be appropriate here only to mention the two grounds on which their lordships relied in denying it. One was connected with the limitation attempted to be placed on Chief Justice Marshall's enunciation of principle. 'It must not be forgotten,' they said (p. 411), 'that the obligations of conquering states with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract.' What is the authority for this? The other was that the rule which makes a conqueror succeed to the obligations of his predecessor is not presented by international lawyers as being without exception, which their lordships seemed to think an objection in itself; and they also seemed to think that, even when the exceptions admit of being stated, a national court would be incapable of applying them to the facts of cases. The truth is that often the rules of international law resemble those of the common law in making their first appearance in a very general and crude form, which practice and discussion elaborate and fence; and where national courts deal seriously with international rules as necessary to their decision—take for instance the dealings of the Supreme Court of the United States with the principles of neutrality, and those of Lord Stowell with the laws of maritime war—they have shown themselves as capable of assisting in the process of definition and application as they have shown themselves to be in matters of the common law. If there were a greater difficulty in the former case than in the latter, it would speak ill for the prospects of a permanent court of international arbitration.—The other point in *West Rand Central Gold Mining Company v. Rex*, namely that if the obligation by international law existed it would not be a contractual one and therefore not available under a petition of right, is analogous to the point in *Queen v. Keyn*, that the court would have been without jurisdiction even if England possessed the right of jurisdiction under international law.

international law is its law, in the absence of express interference by constitutional authority, is an elementary fact. Here again, as in the preceding cases, it is the current international law which enters into the law of England, although the court performs an important and responsible function in helping to shape that law. To the admiralty judges who laid down 'the rule of the war of 1756' it would have been no answer to say that that rule was not to be found in the *Consolat del Mar* or in Grotius; and if it should come up for decision whether the Declaration of Paris is enforceable against a subject of a state which has not adhered to it, it will be for the judges before whom the question is brought to decide whether the process necessary for the growth of international law has been completed in that instance.

Lastly, war, even as between the belligerent states and between each of them and the subjects of the other, is not unregulated violence, but an institution of international law, not created but restrained and moulded by it, as much as the conquest to which war may lead. Private persons may be concerned in that institution before the king's courts, as the Dane, whom in the case of *Wolff v. Oxholm*, 6 M. & S. 92, 18 R. R. 313, Lord Ellenborough made to pay over again a debt due to British subjects, which he had paid to his own government under an ordinance confiscating the property and credits of such subjects, issued during war between the two countries. That judgment is at variance with others, especially United States ones, but whether confiscation is or is not lawful between belligerents, either way it was the international rule which had to be applied. If payment under the ordinance had been treated as a good discharge against the original creditors, that would have been international law interpreted in favour of the defendant; since it was not so treated, that was international law interpreted against him. And having regard to the growing mildness of practice and opinion, the question in any future case of the kind must be whether the confiscation is now allowable.

Another example, happily not likely to occur in England, of the liability of the international laws of war to come before a national court, may be furnished by the right generally allowed to an invader to collect the taxes due to the enemy government in the region which he occupies. Suppose that that government sues for them after the occupation has ceased. Will the payment of them to the invader be reckoned as a discharge? But it is needless further to multiply examples, since it may be hoped that those which have been given will be sufficient to indicate and illustrate the answer which I shall now attempt to make in general terms to the question whether international law is part of the law of England.

The English courts must enforce rights given by international law as well as those given by the law of the land in its narrower sense, so far as they fall within their jurisdiction in respect of parties or places, subject to the rules that the king cannot divest or modify private rights by treaty (with the possible exception of treaties of peace or treaties equivalent to those of peace), and that the courts cannot question acts of state (or, in the present state of the authorities, draw consequences from them against the Crown).

The international law meant is that which at the time exists between states, without prejudice to the right and duty of the courts to assist in developing its acknowledged principles in the same manner in which they assist in developing the principles of the common law.

J. WESTLAKE.

THE LAW SOCIETY ON OFFICIALISM.

THE Report of the Special Committee appointed by the Council of the Law Society (appointed pursuant to a resolution of the Society passed at their annual meeting in 1904) is full of interest. Whatever opinion the reader may form as to the merit of the suggestions contained in it, he will be unable to deny that they require very careful consideration.

During the first three quarters of the last century public opinion was strongly opposed to allowing matters to be dealt with by government officials in any case where it was possible to do without their assistance. It used to be the common opinion that every man could manage his own business better than any other person, even a government official, could manage it for him; but at the present day it is a habit, whenever any inconvenience is felt, to apply to government for help, rather than to endeavour to find a remedy without seeking official aid. The arguments in favour of the former opinion, sometimes called the 'Laissez faire' doctrine, are stated with considerable force and clearness in the Report.

Probably the most strenuous supporter of the 'Laissez faire' doctrine will admit that there are some cases where, on the whole, the balance of advantage is that the business should be transacted by officials; and the question to be considered in such cases is how to reduce the interference of officials to a minimum.

The Report says (at p. 42):—

'There is too great a disposition to lean upon the government and to expect that all work done by government officials will be well done. But surely experience teaches a different lesson. . . . Surely, of the departmental management of the affairs of the army in particular it may be said that ever since there has been a War Office in this country, and certainly down to the present day, gross inefficiency has appeared in its operations, and corruption has at times been rife. It is a trite observation that public business is worse managed than any other business. The work of a government or official department will rarely bear comparison with that undertaken by private enterprise, nor, considering the absence of competition in the public service, is it likely ever to do so. . . . The advantage which individual effort has over a public department may be seen whenever the results of each are brought into competition. It is only by means of competition and restriction that an official department can hope to compete successfully with private

persons. This is seen in the Postal and Telegraph Service, the most remote competition with which, even such as that of Boy Messengers, is immediately strangled, no matter what additional convenience it might afford the public.'

Supporters of the doctrine of 'Laissez faire' will admit that experience shows that in some few cases official control over a man's acts, however unpleasant it may be to him, is, on the whole, beneficial to the community; but the onus of proof that the control would be beneficial lies on those who propose it; they must show that the evil intended to be obviated is one which cannot be avoided without the control, and, further, that the control will not introduce new evils. It is also obvious that the control ought not to be greater than the case absolutely requires. For example: it is for the public benefit that some control should be exercised over buildings in towns so as to minimize the risk of fire spreading from one house to another, but the same control applied to detached buildings in the country has been found by experience to cause serious difficulties in building cottages for agricultural labourers.

The Report contains special remarks as to the effect of officialism in connexion with bankruptcy, the winding up of companies, and registration of title. Probably the committee considered that it hardly fell within the scope of their inquiry to deal with the question why, in each of these cases, officialism was adopted. The Report would have been much more valuable if it had contained answers to this question, particularly if it had discussed how far the objects aimed at by the existing law could have been attained either without or at least with the minimum of officialism.

It is, perhaps, not inaccurate to say that in dealing with such subjects as bankruptcy and other matters specially discussed in the Report, Parliament is more likely to attend to the wishes of the man in the street than to be guided by the advice of lawyers, and that, therefore, in discussing the questions whether any and what official control is proper in cases of this nature, we have to consider not what are the real evils intended to be remedied, but what are the evils which are commonly believed to exist.

The Report makes out a *prima facie* case for a change in the law of bankruptcy and winding-up of companies. It points out that every bankrupt estate has to pass through the hands of an official receiver, who is not directly responsible to the court, but is an officer of the Board of Trade, and who exercises great powers. It proceeds:—'It is clear that this state of things is not popular among creditors. There is a growing tendency to withdraw the realization of insolvent estates from the courts administering the Bankruptcy Act, and to entrust it to assignees nominated or approved by the

creditors themselves.' The Report points out that it appears from the Board of Trade Annual Report, published in 1904, that whether a composition is accepted or the estate is fully administered the pecuniary result is, as a rule, far more beneficial to the creditors in the case of a deed of arrangement than where a receiving order is made.

The Report contradicts the statement in the Report of the Board of Trade above referred to, that the accounts collected under section 25 of the Bankruptcy Act, 1890, 'continue to illustrate the numerous abuses connected with the administration of estates under the Deeds of Arrangement Act, 1887.' It appears, however, that the solicitor to the board had to take proceedings in only forty-five cases to compel the rendering of accounts, and that, in every instance, the account was obtained.

Without considering the details of the suggestions made by the Committee for the improvement of the law of bankruptcy, the principle on which they rest is that the management of the estate should be placed in the hands of the creditors, and apparently (for the Report is not quite clear on this point) that the disciplinary provisions should be separated from the administration of the estate, and that the official control over administration should be confined to an inspection. Those of us who can remember the discussions on the Act of 1883, will recall that public opinion was shocked at the number of bankrupts who, owing to their misdeeds not coming technically under the criminal law, escaped punishment, and probably the law was altered for the purpose of avoiding this scandal without taking into account the harm done to innocent creditors by increasing the expense of administration.

In the early days of limited companies it was a matter of common belief that many of them were formed merely for the benefit of the promoter. The object of the provisions for official control over winding-up was to ensure a full investigation of the affairs of the company, so as, if possible, to protect innocent investors. The Report severely criticizes the existing system for winding-up companies, and discloses a most serious waste of assets. When a winding-up is made by order of court 'an official receiver takes possession of the whole of the company's assets, and instead of merely protecting them and preserving them until the creditors have time to express their wishes, he proceeds at once to realize them, whatever the nature of the assets may be, and to pay the proceeds to the general liquidation account, when they are re-invested, and the bulk of the income until distribution is applied *for the purposes of the department instead of for the benefit of the creditors of the company.*' The italics are my own.

The Report gives an example taken from an official source where the official receiver got in, in the first two months, a sum exceeding £17,000. Although the winding-up order was under appeal, and ultimately reversed as having been made without jurisdiction, the unfortunate company had to submit to a deduction by the official receiver of his costs, charges, fees, and expenses, before they could get back the balance of his realization.

The part of the Report which deals with registration of title is very interesting. The objections raised in the Report to the existing system of registration are the following:—

1. That when once the compulsory provisions have been put in force in any area, a purchaser does not acquire the legal estate if the transfer is not registered;
2. That in all but the simplest cases the impossibility of adapting the form of transfer prescribed by the land registry to the requirements of the case renders it absolutely necessary that a collateral deed should be prepared which it is neither necessary nor desirable to register, and that additional deeds mean additional complication and expense;
3. That after registration the legal estate may be conveyed by an unregistered deed;
4. That the fact that registration works well in the colonies is no argument that it will work well in England;
5. That compulsory registration is extremely unpopular, and that many public authorities have opposed it;
6. The Report also objects to the rule allowing an absolute title to be granted on easy terms when the land has been registered with a possessory title for six years, on proof that the original registered proprietor was a bona fide purchaser on sale, and that he made a proper examination of title, under legal advice, when he bought it.

As above pointed out, the question how far officialism will be insisted on by Parliament depends on the popular opinion at the moment. At one time it was, perhaps, the popular opinion that registration would save expense in dealing with land; but the Report points out that in 1898 twenty-two of the vestries and local authorities within the county of London, nearly all the principal railway companies having their termini in London, the Institute of Bankers, the Ecclesiastical Commissioners, and the principal land and building societies were opposed to compulsory registration; and that in 1903 borough councils, representing a population of nearly 2,700,000 and a rateable value of nearly £20,000,000, presented a petition to the House of Commons stating in detail serious objections to compulsory registration, and that

the petition was supported by the city of London and the borough of Stoke Newington, representing a rateable value of more than £5,200,000, and resolutions denouncing the system have been passed at public meetings attended by representatives of many important public institutions.

I am one of the few lawyers who believe that compulsory registration would, on the whole, notwithstanding the disadvantages attending it, be beneficial. Experience of the working of the Land Transfer Acts has, however, shown that they require considerable amendment to make them work properly, and that in their present form they occasion wholly unnecessary expense, especially in dealing with building estates. The reasons for this opinion will be found in articles in 21 *LAW QUARTERLY REVIEW*, at p. 27, and 50 *Solicitors' Journal*, at pp. 70, 91; and therefore, in my opinion, compulsion ought not to be enforced till the Acts have been amended.

The reader may ask why I consider that registration ought to be compulsory if the Acts were amended. The answer is, shortly, that when the system has got into working order it will greatly diminish the cost of dealing with land, owing to its rendering it unnecessary to investigate the title.

It is, in the absence of statistics, difficult to estimate how often a title has to be investigated; but judging from the number of mortgages that appear in abstracts and the number of cases in which land is taken under compulsory powers, it would probably be fair to suggest that a title has, on an average, to be investigated at least once in every ten years, and probably more often.

In estimating the benefit of registration to the public we must remember that on each investigation both the vendor and purchaser incur costs. It will be found that the costs of registration with absolute title, when accumulated at compound interest for fifteen years, fall short, by a considerable sum, of the joint costs of the vendors' and purchasers' solicitors of investigating the title on a future sale or mortgage, and the costs so saved will be a benefit to the community. It would, I think, be of use to have an inquiry, which can hardly be undertaken by a private person, as to the average number of dealings with land requiring investigation of title within a certain number of years after a purchase; it will then be easy to see whether my opinion is well founded or not.

The third objection raised in the Report, viz. that a legal estate can be conveyed by an unregistered assurance, appears to depend on a misapprehension of a paper read by Mr. Brickdale before the Institute of Bankers, and of a dictum of Cozens-Hardy L.J. in *Capital and Counties Bank, Lim. v. Rhodes* [1903] 1 Ch. 631, that

after first registration 'the legal estate will pass on every subsequent conveyance on sale without registration. . . . Conveyancing may proceed just as if the Acts of 1875 and 1897 had not been passed,' and the Report cites a passage from a work on the Australian Torrens System by Mr. Hogg, where he says:—

'The English System, while in terms purporting to warrant a registered title positively, yet allows estates of validity equal to the registered title to be created. . . . It is inherently vicious in so far as it does not give absolutely a negative warranty as well as a positive warranty.'

The answer to these remarks appears to be the following. An intending purchaser must search the register. If no entry to the contrary appears on the register, he can take a transfer from the registered proprietor without having regard to any unregistered assurance, and on his being entered as proprietor he acquires the legal fee, notwithstanding the unregistered assurance. On the other hand, if he finds an entry on the register protecting the unregistered assurance, he will decline to complete till the entry is vacated, and then he can take a transfer from the registered proprietor, and on registration acquire the legal fee.

Besides transfers and mortgages, there are other cases in which conveyances passing the legal estate are required, and it is impossible to say what the consequences of prohibiting a conveyance off the register may be; such a prohibition would be a leap into the dark. There is at least one case where a limitation which is valid if legal would be invalid if equitable; add to which for the reasons above stated, if the legal estate is conveyed by a deed off the register no purchaser or chargee from the registered proprietor is affected by it.

The Report objects, and objects very reasonably, to the necessity in many cases of having a deed off the register as well as a registered assurance. No doubt this is a serious defect in the Act; it is discussed in the articles above referred to, and could be obviated by a short amending Act.

The Report comments with disapproval on the rule which provides that where application is made for registration with absolute title of land which has been registered with possessory title for six years, the first proprietor having been a purchaser on sale, the examination of title may be modified as the registrar may think fit. The Committee are of opinion that the rule has the practical effect that after the land has been on the register for six years an absolute title can be granted.

The Report calls attention to the alarming increase in the expenditure on business managed by officials. The Board of Trade

Report (1904) shows an excess of expenditure of the Board in respect of bankruptcy for the year (more than four-fifths of which is in respect of the salaries and pensions of officials) over income of more than £29,000. The Report considers that the accounts are incorrectly kept as regards an item of £18,658 included in income, and representing dividends, which it says ought to be credited to the different estates of which they are the proceeds, and as to an item of more than £36,000 which the Report alleges to be a fictitious item. The context shows, however, that it is not intended to charge the Board of Trade with falsifying the accounts, but merely to accuse it of an extraordinary method of book-keeping.

The Report states that the receipts for the year ending March 31, 1904, of the winding-up department of the Board of Trade were £24,591¹, which was too little by £2,800 to meet its expenses. The Report observes that more than half the receipts of the department are derived from income upon the accumulated funds of estates in liquidation, including not only estates being administered by official receivers, but also those in voluntary liquidation.

The Report points out that for the purposes of land registration in one county alone there is an office with an establishment of 240 officials of various grades, and a building which is to cost more than £25,000, and they point out that the costs of registration, if it is made compulsory all over England, will be enormous.

In conclusion I feel that the Committee deserve thanks not only from the profession, but from the country, for the labour and skill that they gave to the Report, and that their conclusions, whether we agree with them or not, deserve to be most carefully considered.

HOWARD W. ELPHINSTONE.

¹ The remuneration to officials amounted to more than £22,000.

THE FALSE PASSPORTS CASE.

THE judgment in this case (*Rex v. Brailsford and Another* [1905] 2 K. B. 730; 21 T. L. R. 727) has not, perhaps, received the attention it deserves, probably because it was delivered just before the Long Vacation. Its political or constitutional significance seems to have escaped everybody's notice except that of a small group of men who, just as the democratic sailors¹ at Athens 'were at any time ready to attack oligarchy, real or imaginary,' are ever vigilant for liberty.

The undisputed facts are that about October, 1904, *B* obtained from the Foreign Office a passport for Russia for one *M*, who permitted a third person to use it and to sign his name on it as *M* 'the bearer' of it.

The passport was ultimately found on the dead body of a man who had called himself *M* and who had blown himself up with a bomb in St. Petersburg on February 28, 1905. *B* and *M* were undoubtedly acting in concert throughout (and it may be fairly assumed that the dead man was the person who had signed *M*'s passport as bearer—for the bearer might be called upon at any moment to write his signature—and that he could not, with safety, have got into Russia with one in his own name).

For this they were indicted and fined £100 each. The offence alleged is undoubtedly obtaining a passport by the false representation that one of the obtainers intended to use it himself.

Now, it is not suggested here that in law they were not guilty; on the contrary, it is submitted that the existing law (probably) reached them². But if this is so, it makes the technical course

¹ Thucyd. viii. 73.

² i. e. the law of conspiracy, which is admittedly in a curious condition, and as to which there may be doubts even in this case. A second count charging an obtaining by false pretences (without conspiracy) was practically withdrawn. It is by no means clear why the Crown did not rely upon this count jointly indicting the defendants for obtaining property, viz. a passport, by false pretences or one charging them with conspiracy to obtain and obtaining by false pretences, &c. There is plenty of authority for holding such an instrument to be property or a chattel. In *Perry's* case in 1845 (1 Den. C. C. 69; cf. the similar cases: *R. v. Clarke*, 2 Leach 1030 in 1810; *R. v. Vyse*, 1 Moody C. C. R. 218 in 1829; *R. v. Mead*, 4 C. & P. 535 in 1831) the prisoner stole and cashed a cheque (which was afterwards assumed to be void for want of a stamp). He had been indicted not only for stealing the cheque but also in another count for stealing a piece of paper, value 1d. It was held unanimously by ten judges that the conviction on this latter count was good. 'The piece of paper makes an end of the question,' said Alderson B.; Cresswell J. thought

which was taken the more extraordinary, and it is that course *only* which it is proposed to examine here. Its main interest is derived from a doctrine which the Lord Chief Justice laid down—one of such moment that apart from any other professional point in the case, it deserves a separate inquiry.

He is reported¹ to have said :—

‘A motion was made by Sir Robert Reid for a new trial upon the ground that there was no sufficient evidence in support of the indictment, and that the jury had been misdirected, in that it had not been left to them to find that the act done might tend to public mischief. Without saying that there cannot be acts upon which an innocent construction might be put or that in some cases it might not be for the jury to find as a fact whether the act was innocent or not, we are clearly of opinion that no such argument can possibly be urged in this case. In criminal as well as in civil cases persons are responsible for the natural consequences of their acts. It was not disputed that there was abundant evidence that the defendants did combine to obtain a passport in the name of McCulloch with the intent that it should be used in Russia by some other individual and that in fact it was so used with their knowledge and consent. We are of opinion that it is for the court to direct the jury as to whether such an act may tend to the public mischief and that it is not in such a case an issue of fact upon which evidence can be given. Assuming the matter to relate to the issue of a public document by a public department of State and it is obtained by a false representation for an improper purpose—i. e. for use by a different person passing himself off as a *bona fide* holder—we are of opinion that it is injurious to the public and tends to bring about a public mischief. It is scarcely necessary to cite authority, but we would call attention to the reasoning of Lord Mansfield in *Re v. Vaughan* (4 Burr. at p. 2499).’

Thus it is clearly laid down that the question of ‘public mischief’ or no public mischief is for the Court to decide and not for the jury. It is easy to see the immense political importance of this doctrine—if ever certain moments in our history should repeat themselves.

that as it would be larceny to steal a blank cheque it would be no better if it were filled up. In *Clarke's* case the judges said : ‘These stamped papers . . . were, indeed, only of value to [the] owners ; but it is enough that they were of value to them . . . The judges, therefore, are of opinion that to the extent of the price of the paper, the printing and the stamps they were valuable property belonging to the prosecutors.’

The false pretence alleged would be the representation that *M* intended to go to Russia, whereas he had no such intention. Since the *Queen v. Gordon* in 1889 (23 Q. B. D. 354 in C. C. R.) no difficulty has been felt about the statement of the present existence of a state of mind being an allegation of an existing fact.

It could not have been said that the law had been strained, if such a count had been used in this case, for a fraud had undoubtedly been practised on the Foreign Office. It is only when the forms of law are employed where there is no substance of wrong that the public conscience revolts.

¹ *Re v. Brailford and Another* [1905] 2 K. B. 746 ; 21 T. L. R. 730. The other members of the Court were Lawrance and Ridley JJ.

We are at once confronted with this dilemma: if 'public mischief' is a material averment in the indictment, how can it be withdrawn from the jury? if it is not, why this solemn argument whether it is for the jury or not?¹

The phrase in question, it must be observed, is brought on the scene in the indictment—probably one of the most ingenious ever framed and necessarily unique—which concluded²:

'To the evil example of all others in the like case offending in contempt of our said Lord the King and his laws in fraud of the said regulations issued by and with the authority of the said Principal Secretary of State for Foreign Affairs to the injury, prejudice and disturbance of the lawful, free and customary intercourse existing between the liege subjects of our said Lord the King and the subjects of the said Tsar, to the public mischief of the said liege subjects and to the endangerment of the continuance of the peaceful relations between our said Lord the King and the said Tsar of Russia and their subjects respectively, and against the peace of our said Lord the King, his Crown and dignity.'

The various evils apprehended by the draftsman are conveniently summed up in 'public mischief.'

The Lord Chief Justice gives no authority whatever for the proposition that the question of 'public mischief' or not is not for the jury (though in the argument he is reported as saying, 'I should have thought that according to the authorities, the question of tendency was for the judge and not for the jury,' 21 T. L. R. 729). The reference to *Vaughan's* case has, apparently, got out of its place in the report, for there is not a syllable in it about a jury (and could not be, as it was a motion for a rule for an information); but it is very much in point on another part of the case, viz. whether any misdemeanour in law had been committed—as it deals with an attempt, in 1769, to bribe the First Lord of the Treasury (the Duke of Grafton) with £5,000 to procure an office—and it was to this that the Lord Chief Justice was certainly referring.

His lordship, it will be observed, lays down no general rule. He distinctly says that his opinion only touches this case; 'it is not in *such* a case an issue of fact,' can only mean in *such* a case *as this*. Moreover he expressly admits that 'in some cases' there is an issue of fact—of innocence or guilt—for the jury. What, then, distinguishes this case from other cases where public mischief is alleged? This case is novel (though, by the way, there must have been many other instances of passports fraudulently obtained);

¹ It may be suggested with diffidence that in view of the abuse of the law of conspiracy in the past and the uncertainty of some of it in the present the Lord Chief Justice wanted the issue fought out on a broad ground visible to laymen as well as to lawyers. But the primary question here is unaffected by this point.

² *Ibid.*, at pp. 736-7 and 727-8 respectively.

there can, therefore, be no authority on the precise point. If there is no authority, except that of the Lord Chief Justice, for his precise proposition, is there any bearing on the point by analogy or implication or otherwise? Yes, there is the historic precedent in the law of libel and it is dead in the teeth of his lordship's theory.

'Before Fox's Libel Act [1792],' says Dr. Blake Odgers, 'it had come to be the rule that in a criminal case the judge and not the jury should decide whether or no the publication was a libel. On proof of publication of the innuendoes and of the other necessary averments, the judge would direct the jury to find the defendant guilty. . . . But that Act declares and enacts that on the trial of an indictment or information for libel the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue before them¹.'

Libel is not, indeed, fraud, but there is a clear analogy between the abolished practice of the bench in the former and the recent practice in the latter. Prove, said the judges before 1792, that the defendant said (and published) so-and-so and meant thereby so-and-so and I will tell you whether he is guilty of libel or not. Prove, says the Lord Chief Justice in 1905, that the defendants did certain acts and I will tell you whether they tend to or constitute a public mischief and so whether your verdict should be guilty or not guilty. The reasons which led in libel to a clear restatement of the law—not in accordance with the judicial view—may be found to apply to fraud.

It is, therefore, perhaps worth while to read the old classic discussion a little closely.

The controversy came to a head in the *Dean of St. Asaph's* case² in 1784. The Dean was indicted for a seditious libel in that he had reprinted a 'Dialogue' (by the great Sir William Jones). Mr. Justice Buller—to put it very shortly—told the jury that the only questions for them were (1) did the defendant publish the pamphlet? (2) were they satisfied 'as to the truth of the innuendoes³'? These, alleged in the indictment, were that in the Dialogue 'G.' meant Gentleman, 'F.' Farmer, 'the King' the King of Great Britain, and 'the Parliament' the Parliament of Great Britain. If they were satisfied of these two points 'you ought to find him guilty.' But Erskine, who defended, had anticipated that the judge's view of the law would be the chief force against him, and had striven with all his eloquence to make the jury believe

¹ On Libel, 4th ed., p. 680.

² 21 State Trials, 847.

³ The report adds 'in point of law'—a clear verbal inaccuracy, for the whole point of the judge's contention is that the jury have nothing to do with any question of law.

that they were the masters of the whole situation and could say finally Libel or no Libel. Their verdict was a 'moment' in our legal annals: they found the defendant 'guilty of publishing,' and after a long wrangle their verdict was entered 'guilty of publishing but whether a libel or not the jury do not find.' Erskine obtained a rule for a new trial on the ground of misdirection.

His famous speech in support of the rule might, *mutatis mutandis*, be read as an argument for the duty of the judge in the present case as contended for by the defendants' counsel; where Erskine speaks of the tendency of a publication to sedition, substitute that of certain acts to public mischief, and his reasoning might be transferred hither bodily. The rule was discharged. He thereupon moved in arrest of judgment, explaining to the Court that the only reason he had taken the other step in procedure first was 'the importance of the principle which it involved and the danger of the precedent it established'—and was successful, upon grounds not relevant here.

'So,' says¹ Lord Campbell, 'ended this famous prosecution. It seemed to establish for ever the fatal doctrine that *libel* or *no libel* was a pure question of law for the exclusive determination of Judges appointed by the Crown. But it led to the subversion of that doctrine, and the establishment of the liberty of the press, under the guardianship of English juries. The public mind was so alarmed by the consequences of this decision that Mr. Fox's libel bill was called for, which *declared* the rights of jurors in cases of libel; and I rejoice always to think that it passed as a *declaratory* act, although all the judges unanimously gave an opinion, in the House of Lords, that it was inconsistent with the common law.'

Note the statement of a Lord Chancellor—that the Libel Act was only *declaratory*, i.e. all the time the common law was, so to say, on the side of juries. The *principles* which underlie it must surely apply here. We may try to educe some of them.

In 1670 occurred the trial² of Penn and Mead for 'Tumultuous Assembly.' They were acquitted to the great disgust of the Recorder of London, who fined each jurymen 40 marks and sent him to Newgate till he paid. One, Edward Bushell, sued out a writ of *habeas corpus* and was promptly liberated (with his fellows) by the Common Pleas, over which Vaughan C.J. presided. In a great judgment, reported³ by himself, there is the following passage:—

'We come now to the next part of the Return, viz.: That the jury acquitted those indicted against the direction of the Court in matter of Law, openly given and declared to them in Court.

¹ Lives of the Chancellors, *Erskine*, c. 178, p. 435.

² 6 State Trials, 951.

³ Vaughan's Reports, p. 135, at 143.

1. The words, That the jury did acquit against the direction of the Court in matter of Law, literally taken and *de plano* are insignificant and not intelligible; for no Issue can be joined of matter in Law, no jury can be charged with the tryal of matter in Law barely, no Evidence ever was or can be given to a jury of what is Law or not; nor no such Oath can be given to or taken by a jury, to try matter in Law, nor no Attaint can lie for such a false Oath.

Therefore we must take off this veil and colour of. words, which make a shew of being something and in truth are nothing.

If the meaning of these words, finding against the direction of the Court in matter of Law, be, that if the judge having heard the Evidence given in Court (for he knows no other) shall tell the jury upon this Evidence, the Law is for the Plaintiff or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly, then the Jury ought of duty so to do; Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining Right and Wrong, and therefore the Tryals by them may be better abolish'd than continued; which were a strange new found conclusion, after a Tryal so celebrated for many hundreds of years.

For if the Judge, from the Evidence, shall by his own judgment first resolve upon any Tryal what the Fact is, and so knowing the Fact, shall then resolve what the Law is and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all?

But if the jury be not obliged in all Tryals to follow such Directions, if given, but only in some sort of Tryals (as, for instance, in Tryals for Criminal matters upon Indictments or Appeals) why then the consequence will be, tho' not in all, yet in Criminal Tryals the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in Civil Tryals.'

Part of Erskine's paraphrase of this memorable passage (some of which he cited) is:—

'... Let us get rid of the fallacy of applying a maxim¹ which truly describes the jurisdiction of the courts over issues of law, to destroy the jurisdiction of jurors, in cases where law and fact² are blended together upon a trial.'

¹ i. e. that the jury have not to answer questions of law.

² A verdict is in truth always a finding of law and fact; the ordinary formula—'We find such and such facts and therefore believe that the prisoner is guilty [or not] in law;' when any actual legal distinction has to be attended to, e.g. manslaughter or murder? the reference to the law is conscious and expressed. One of the latest inquirers into the subject says: 'From the beginning, indeed, it was perceived that any general verdict such as no disseisin or not guilty involved a conclusion of law and that the jury did, in a sense, in such cases answer a question of law' (Thayer, *Evidence at Common Law*, c. 5, *Law and Fact in Jury Trials*). He cites (*ibid.*, p. 194): 'It is not because facts are admitted that it is therefore for the judge to say what the decision upon them should be. If the facts which are admitted are capable of two equally possible views which reasonable people may take and one of them is more consistent with the case for one party than for the

Previously he had said :—

'Every person charged with any crime by an indictment or information, has been in all times, from the Norman Conquest to this hour, not only permitted, but even bound to throw himself upon his country for deliverance by the general plea of Not Guilty; and may submit his whole defence to the jury, whether it be a negation of fact or a justification of it in law. . . . The general plea thus sanctioned by immemorial custom, so blends the law and the fact together, as to be inseparable but by the voluntary act of the jury in finding a special verdict: the *general* investigation of the whole charge is therefore before them.'

Later on he gave a striking object-lesson of his view. Recently Colonel Gordon had been indicted for killing a man in a duel; whether it was murder or manslaughter was, 'according to [Mr. Justice] Foster, as much a question of law as libel or no libel': nevertheless the judge at the trial did not withdraw the question from the jury, he laid it down 'of this law and of the facts as you shall find them, your verdict must be compounded'; he told them that 'a duel however fairly and honourably fought was a murder by the law of England' and left them to find a general verdict; he did not tell them that the question of murder or manslaughter was one with which they had nothing to do or direct them to find 'guilty of killing in a deliberate duel' and to leave the rest to the Court. 'By this direction . . . the judges, not the jury, would have decided upon the life of Colonel Gordon.'

Even Lord Mansfield, who was against Erskine, had to admit—'It is almost peculiar to the form of the prosecution for a libel, that the question of law remains entirely for the Court *upon record*'¹; he evidently knew of no other instance², he does not even suggest that in the infinite variety of the common law there may be other trials in which the jury are not allowed to say in a word, guilty or not guilty. And there seem to be none.

Enough, perhaps, has been said to show that, in libel, at any rate no part of the indictment may be withdrawn from the jury—and this not upon any special consideration of that charge but as a fundamental principle of criminal law. But libel is not fraud.

other, it is the duty of the judge to let the jury decide between such conflicting views' (*per* Bowen L. J. in *Davey v. L. & S. W. Ry.* (1883) 12 Q. B. D. 70, 76).

It is not open to doubt that a jury may insist on returning 'a short general verdict' if they will. (See, for instance, Thayer, p. 219).

¹ 21 State Trials, 1035.

² Nor does Sir James Stephen. Speaking of this case, he says: the words of Fox's Act 'are to the effect that the whole matter in issue upon a plea of not guilty to an indictment for libel is to be left to the jury as in other criminal cases, but they do not say what is in issue on such a plea. The general principle is that a plea of not guilty in a criminal case puts in issue all the material averments in the indictment' (2 History of Criminal Law, c. 24, p. 359). Apparently he thinks the law of libel is anomalous in some respects not affecting the argument here.

Is there, then, anything in the nature of the common law misdemeanour now in question why the rule should be different? It is submitted that there is not.

It is nothing more nor less than a question of common sense. If a jury may roundly determine whether a writing justly or unjustly holds a man up to hatred, ridicule, or contempt in private life—or if the document deal with politics, society or the like, whether its tendency be for or against public morality¹ or loyalty, whether it be 'seditious' or not, surely they may with equal reason—aye, and equal safety to the Commonwealth—pronounce broadly whether certain acts tend to the public mischief or not. *For this purpose*, what special advantage has the judge over them? or, indeed, what special facility or training has he for deciding such a point? There is nothing technical about it. Is it not peculiarly a case in which, as Demosthenes² put it, every citizen is patriotic because every individual's welfare is involved in that of the State? This is a topic which requires no learning and which every one can decide for himself.

The truth is that there is a danger that a judge—not, indeed, this judge—may veil under a ruling that it is not for the jury to say whether certain acts tend to the public mischief, a fear that they would say they do not. Herein, of course, is the gravity of the matter, and this has been thoroughly recognized by some of the judges themselves.

'Jealousy of leaving the law to the Court,' said Lord Mansfield in the *Dean of St. Asaph's* case³, 'as in other cases, so in the case of libels, is now in the present state of things, puerile rant and declamation'; i. e. he recognized that it was due to other than purely lawyers' points of view. But said his colleague Willes on the same occasion⁴. '... But the *jury* are not so restrained, because they resort to evidence, as by law they have a right; that is, to go according to their own knowledge, and therefore they may find that which by the indictment is called *false* and *seditious* not to be so; they may indirectly say, "We know it to be true, and written for the most salutary purposes."'

So Cockburn C.J. writing to the Attorney-General in 1879 (on another subject) says:—

'The question is essentially one of fact and ought not, because it may be one which it may be better to leave to the judge to decide than to submit to a jury, to be, by a fiction, converted

¹ They are already '*ex post facto* censors of the press,' according to Sir James Stephen, ² Hist. Cr. Law, c. 34, p. 366.

³ De Cor. 158.

⁴ 1. c. 1040.

⁵ Report in 4 Doug. at 172.

into a question of law. . . . The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge¹.

In other words, if you want to retain certain powers in the hands of the Bench, do not pretend that they are exercised on matters of law but say openly that it is expedient that they should be decided by the one and not by the many.

The same point essentially, as is in question here, arose in the *Queen v. Farnborough* ([1895] 2 Q. B. 484). On a charge of larceny, the jury being unable to agree, the learned Chairman of Middlesex Quarter Sessions asked them whether they believed the evidence for the prosecution, they said that they did, whereupon he directed them that this was a verdict of guilty. In stating a case, he says, 'The question is, Had I the power to put the question and direct such verdict to be recorded, *the facts in the judgment of the Court clearly constituting in law the offence charged*, if proved to the satisfaction of the jury?' Counsel for the prosecution 'threw up the sponge' in the Court for Crown Cases Reserved and the five judges there quashed the conviction. Lord Russell of Killowen C.J. said :—

'It is easy to see that the facts might be such as to justify the jury in believing the evidence, and yet declining to draw the inference that the prisoner had any *animus furandi*. The chairman *in effect drew that inference himself* and found that the prisoner had acted with a guilty intent—a fact essential to be found before his guilt could be established; in doing so he went beyond his function, &c.'

The plain English of the whole matter is put by Mr. Thayer² :—

'Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts, so that the true significance of ascertained facts might be ascertained and declared by the one tribunal fitted to do this finally and with authority. But considerations of policy have called louder for leaving to the jury a freer hand. The working out of the jury system has never been shaped merely by legal or theoretical considerations. That body always represented the people and came to stand as the guardian of their liberties; so that whether the Court or the jury should decide a point could not be settled on merely legal grounds; it was a question deeply tinged with political considerations. While it would always have been desirable, from a legal point of view to require from the jury special verdicts and answers to special questions, that course would have given more power to the King and less to the people.'

¹ Cited, Thayer, p. 202.

² *Ibid.*, pp. 218-19.

The people of this country, as legislators, have always reserved to themselves, as juries, the right of impressing their view—the popular view—on their verdicts. The common law of this country expresses the politics of the people as well as their morals. Indeed, morals include politics. In short, the jury is a political power¹.

There are, perhaps, other objections to allowing the judge to withdraw from the jury the question whether given acts tend to public mischief or not.

It is obvious that if a judge may decide this question entirely 'off his own bat' there is no need at all for *any* positive criminal law. For crime is wrong-doing from the public point of view (as distinguished from the private). It is impossible to conceive any of the familiar offences in this country which an average respectable and educated man would not declare of evil example and a public mischief. The inquiry would then be purely moral—expressly and nominally so instead of as now implicitly and only ultimately so. There may be something to be said for this system, but it is not our system. The common law means the morals of the people at any given time; the judges interpret it, not because they are lawyers, but because they are members of the people, born and bred among them and, therefore, sharing the mind of the people. Hence they are as well fitted as any one else to pronounce on new cases or new offences—i. e. not covered by precedents—when they arise. But a difficulty has always been felt about new offences, as in the present case.

'The class of offences,' says Sir James Stephen², 'of which nuisance may be taken as the type and which consists of acts injurious to the public as a whole and in particular of offences relating to religion and morals, is composed partly of common law and partly of statutory enactments. To this class must be referred the power which has in some instances been claimed for the judges of declaring anything to be an offence which is injurious to the public, although it may not have been previously regarded as such. This power, if it exists at all, exists at common law.'

¹ This is admirably put by Earl Russell: 'Thus, not only are juries in fact the real judges in England, but they possess a power no judge would venture to exercise, namely, *that of refusing to put the law in force*. Undoubtedly this is a very dangerous authority, more especially as juries, consulting in secret, deciding without reason assigned, and separating without being afterwards responsible, are free from all control but that of their own consciences; yet exercised as it has been with temper and moderation the discretion of juries has proved extremely salutary. It has been the cause of amending many bad laws, which judges would have administered with exact severity and defended with professional bigotry; and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made cannot long exist in England.'

'... It is to trial by jury, as much perhaps as even to representation, that the people owe the share they have in the government of the country.' *Essay on the English Government and Constitution*, c. 33 (written about 1820: the author was then Lord John Russell).

² *History of Criminal Law*, c. 20, p. 190.

The words 'not . . . previously regarded as such' must refer to new states of facts, not before thought of or arisen; they cannot refer to well-known evil-doing suddenly erected by an individual judge, as a depository of the common law, into a crime. For nobody would suggest that a judge could nowadays declare that seduction is an indictable offence, though it is severely condemned¹ by popular morality, because, in fact, though there have been abundant opportunities, no such charge has ever been preferred; (why, originally, common law morality spared this wrong is an interesting speculation). 'The power . . . claimed for the judges' must, therefore, refer to absolutely new combinations of facts, such as that in the present case.

As to these, then, is it law that a judge can call into existence a new indictable offence?

Let us turn to high authority.

'It seems to be assumed,' says² the very learned judge last cited, 'that when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are³ [to be found in] previous judicial decisions or in books of recognized authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be.'

'Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition and would place the bench in an invidious position. The last occasion on which such a course was taken was the treatment of conspiracies in restraint of trade as a common law misdemeanour . . . the history of this matter . . . is by no means favourable to the declaration by the bench of new offences⁴.'

It is clear that this writer thought that the day for making new crimes (except by statute) was passed—the canon, so to say, of common law crimes was closed. Indeed, he goes on—

'A new state of things has come into existence. On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings and active

¹ And even a legal offence in some countries including the United States where, indeed, it is (the writer believes) in fact indictable.

² 2 Hist. Cr. Law, c. 34, p. 352.

³ There is some misprint here.

⁴ Ibid p. 359. The case is *R. v. Bunn* (12 Cox, 316) in 1872.

in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them. . . . Besides, there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined, and this is an additional reason why its further development ought to be left in the hands of parliament.'

Accordingly, the learned judge categorically proposed¹ (in his Draft Code) to abolish all prosecutions at common law.

It is in view of such opinions of this jurist as have been quoted that an Article² in his Digest of Criminal Law has not been cited as an authority for the Lord Chief Justice's thesis, though, if read literally, it might be so taken. It runs:—

'Acts Involving Public Mischief. Acts deemed to be injurious to the public have in some instances been held to be misdemeanours, because it appeared to the Court before which they were tried that there was an analogy between such acts and other acts which had been held to be misdemeanours, although such first-mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them.

This has been done especially in the case of agreements between more persons than one to carry out purposes which the judges regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy.'

It is submitted that, in the light of other dicta of this writer some of which have been set out above, this cannot mean that in cases of this class the judge could withdraw the element of 'injurious to the public' from the jury, but that it must mean that, where there was no exact precedent, the judge ruled that the allegations in the indictment either constituted a misdemeanour or did not, and in the latter case quashed it. And this has never been denied.

It must be clear that if the Lord Chief Justice is right in holding that he was entitled to declare that a chain of acts—admittedly novel—constituted a public mischief, he has, in fact, created a new indictable offence. And this a great many people would regard as a grave political danger.

'But,' said³ the Lord Chief Justice in argument, 'what evidence of tendency could be given?'—'it was not a matter on which any evidence was required or could be given.'

¹ 2 Hist. Cr. Law, p. 358.

² Art. 178, C. xvi. Undefined Misdemeanours. Part IV. Acts Injurious to the Public in General, p. 123, 6th edition.

³ 21 T. L. R. 729.

In the first place, there is no reason why evidence should not have been called to show that the Russian Government had complained to our Government—as no doubt it had—and had threatened or was likely to put a check upon the present circulation of British subjects in Russia, if the abuse of passports was allowed to go on. Even then it is conceivable that a British jury might have thought¹ that it was worth putting up with some public inconvenience if the cause of Russian liberty was thereby promoted. If the same thing had happened at Naples, *tempore Bombae*, they certainly would have thought that the exclusion of British tourists from those delightful realms would have been a cheap price to pay for not erecting obstacles to the overthrow of the tyrant. But, suppose no such evidence could be given; does it follow that the question must be withdrawn from the jury? Suppose a man were to preach immorality openly in this country; he would, as Jowett said, be pelted but he could be indicted, too. What proof could be offered that this tendency was immoral? Yet the jury must judge and must be invited to do so—even if his words were quite explicit. So Sir James Stephen says² of ‘fair comment’ :—

‘If the words were “This is a wicked book,” it would be . . . plain that the words were defamatory, and the question to the jury would be whether the comment contained in them was fair. It is, however, perfectly true that when the jury have to decide such questions as that of fair comment and the like, they are obliged to form their own opinions as to the whole subject, the character of the language used as well as the rest.’

In this connexion, and because it illustrates the already illustrated sympathy of this writer with juries, the following words³ may be cited :—

‘A jury can hardly be expected to convict a man whose motives they approve and sympathize with, merely because they regard his intention with disapproval. An intention to produce disaffection is illegal, but the motive for such an intention may be one with which the jury would strongly sympathize, and in such a case it would be hard even to make them understand that an acquittal would be against their oath’;

and to avoid this danger he says, on the next page, that the logical thing is to take away from them intention, and to leave them ‘the tendency of the matter published.’

¹ Is it impossible that they would have returned a verdict on the model of the following recorded by Sir James Stephen (since the Libel Act) ?—‘The jury are of opinion that the pamphlet which has been proved to have been written by J. Reeve, Esq., is a very improper publication, but being of opinion that his motives were not such as laid in the information, find him not guilty’ (2 Hist. Cr. Law, c. 24, p. 368).

² 2 Hist. Cr. Law, c. 24, p. 357.

³ Ibid., p. 360.

It is not disputed for a moment that the judge has a right to express his opinion of the tendency of acts or publications alleged. In the case of libel there is express authority for this. In 1820 Abbott C. J. and the K. B. held that a judge not only might but ought to tell the jury 'if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment; and that if it be so in their opinion, the publication is an offence against the law' (*Rees v. Burdett*, 4 B. & Ald. at p. 183, 22 R. R. 593). Authority even goes further.

'The whole objection,' said Tindal C. J. in 1841, 'amounts to this—that the opinion of the judge was delivered in favour of the defendant. I think it is no objection that a judge lets the jury know the impression which the evidence has made upon his own mind. At all events, the party objecting to such a course should show that the impression entertained by the judge was not justified by the evidence' (*Davidson v. Stanley*, 2 Man. & G., at p. 728, 58 R. R. 562).

In the same case, Bosanquet J. asked, 'Is a judge merely to read over his notes without saying in what manner the case strikes him?' But all these judgments state or imply that the judge must take the jury's opinion too.

To conclude, it may be worth glancing at the question whether, in fact, the acts charged tend to produce a public mischief, i. e. whether twelve honest and reasonable men must necessarily so find. Of course we all know that every touch of immorality, the least thing *contra bonos mores*, is a common¹ evil, if only because it tends to perpetuate itself. But it is a commonplace that there is much moral wrong of which the criminal law will not take notice: 'It would be against common sense to hold criminal an agreement between two persons to walk in a park without leave, or to dishonour a bill².' It is easy to take any trumpery offence and dub it as of public importance. It is true that in this case a fraud was committed on a public office, but if that is the extent of the public mischief, then it is not greater than that caused by the numerous persons who use the Post Office and the Telegraph in the commission of frauds. But who ever heard of such swindlers being indicted for a public mischief, on the ground that the Post Office is a public institution? It is true that the latter is purely adminis-

¹ The distinction between public and private in morals is really false; all wrong is both a public and a private evil. There is an aggravation of moral wrong by the greater number cognizant of a pernicious example.

² Wright on Conspiracy, p. 66. Cf. p. 83: 'To permit two persons to be indicted for a conspiracy to make a slide in the street of a town or to catch hedge-sparrows in April would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve.'

trative, but can it be said that, in the issue of passports, the Foreign Office is practically anything else? Of course, if every abuse of a public office is indictable as a public mischief, there is an end of the matter. But, in the present case, does any one share the apprehension of the indictment, that the defendants' trick was 'to the endangerment of the continuance of the peaceful relations between' the King and the Tsar and their subjects? Which is more likely to embroil this country with the Government of Russia, the escapade of two private individuals, or the constant, systematic and bitter denunciations of that Government by the most powerful organs of the press in this country? Yet who ever heard of editors, or publishers or writers being indicted for provoking war? Quite recently Mr. Justice Phillimore told¹ an Old Bailey jury that 'it was not a seditious libel, or, indeed, a libel at all, to use strong language against a foreign Government.'

But, it may be objected, surely, if this kind of fraud was to become general, it would lead to international trouble. This, no doubt, is true, but the remedy is obvious. If the Russian Government makes representations that our passport regulations are abused to their prejudice, there is nothing easier than—as States often do at each other's behest—to alter them, say, by insisting on a photograph of the applicant with the office stamp being affixed to the passport, or an accurate description of his personal appearance being included therein. But can it truthfully be said, that there has been the slightest—in the words of the indictment—'injury,' or 'prejudice' or 'disturbance of the lawful, free and customary intercourse existing between the liege subjects' of the King and the subjects of the Tsar, on account of this episode? Is not all this mere rhetoric, and is not the Foreign Office supremely indifferent, *so far as we are concerned*? In short, as to British public mischief, there has been none. Undoubtedly, there has been a Russian public mischief (at any rate from the official point of view which identifies government and people), for as the indictment² says, the passports 'were addressed to all those in the said dominions of the Csar of Russia whom it may concern,' but this is not the public mischief alleged for that is expressly averred of 'the said liege subjects,' i. e. of the King, who are pointedly, as we have just seen above, contradistinguished from those of the Tsar. Indeed, who ever heard of the common law of this country contemplating the public weal or woe, or even the existence, of any other?

On the whole, it is submitted that this 'new combination of circumstances' has not been dealt with 'in accordance with prin-

¹ Law Journal, Sept. 23, 1905.

² [1905] 2 K. B. 731.

ciples already established,' to use the language of Sir James Stephen. It is a practical question whether his view, that the safer way to deal with new offences of doubtful illegality is to legislate for the future and not to try them at the moment, should have prevailed in this instance. That view is supported by the words of another eminent thinker¹: 'On the whole it is conceived that there can be very few kinds of minor offences the quality of which can be so altered by agreement,' i. e. conspiracy, 'as to make it necessary to punish them by indictment, and that those kinds ought to be considered beforehand by the legislature and specified in the written law.'

HERMAN COHEN.

¹ Wright on Conspiracy, p. 85.

THE ORIGIN AND DEVELOPMENT OF THE BENGAL SCHOOL OF HINDU LAW (*continued*).

THE guiding principle of the law of inheritance as propounded in the Mahanirvana-tantra is *affinity*, the principle which regulates the rules of inheritance in most of the advanced systems of jurisprudence. Natural love and affection move the human mind to desire that property on death should pass to certain person or persons, and the *tantra* laid down rules of inheritance consistent with such love and affection as accorded with the conditions of life existing in those days.

The principle of religious efficacy through the performance of the Parvana Sraddha, the periodical offering of funeral cakes—which is stated to be the guiding principle of the Dayabhaga system—had little to do with the rules of inheritance laid down in the Mahanirvana-tantra. The principle of inheritance was also not based on connexion by means of particles of flesh and blood—*pinda* as defined in the Mitakshara, which bases heirship on consanguinity and membership in the *gotra* or family. Many of the female relations who are now excluded by the current Bengal law are included in the tantras in the line of heirs. They must be excluded on the theory of spiritual benefit by means of offering of funeral cakes. But customary law in Bengal had a different basis. The inclusion of female relations is just what one would expect from the exalted position that Buddhism and the Brahmanical tantras gave to woman. The patriarchal system, which is the foundation of the Mitakshara, is almost entirely ignored in the tantra and was not apparently recognized in practice.

The general rules of inheritance are laid down in chapter xii of the Mahanirvana-tantra in the following verses:—

‘6. Affinity is by means of birth or marriage. The former is superior to the latter.

7. In matters of inheritance, O goddess, the descending line of heirs is superior to the ascending line, and a male is preferred to a female, when they are otherwise equal.

8. Heirship is always regulated by nearness of relationship, and the wise should divide the wealth of the deceased accordingly.’

Having enunciated these general rules, the tantra illustrates them and lays down the order of succession which agrees in many respects

with the present law of the Bengal school as well as the Mitakshara, but differs from them on some material points. The divergence is the greatest in the case of female relations.

The order of intestate succession almost entirely agrees with that given by Jimutavahana in his Dayabhaga as regards (1) son, (2) grandson, (3) widow, and (4) daughter. This is also the order of succession under the Mitakshara system, when the deceased owner is separate from his coparceners and the patriarchal system has necessarily lost its hold.

The sister is an heir under the tantric system, and the sister's position is almost the same as we find it in the Maharashtra school. Her exclusion in the Bengal school from the line of heirs is based on reasons of spiritual welfare by means of the offerings of *pindas*, which she is incompetent to offer at the ceremonies called periodical *Sradhas*, but the rules in the tantra being based on affinity and not spiritual welfare, the sister naturally comes in as an heiress. She is one of the nearest and dearest of relations, and has consequently a place. It is a pity the Dayabhaga has excluded her. The step-mother is also in the line of heirs, and the sister's sons are brought in very prominently.

Almost all the rules of intestate succession in the tantra are permeated by the same principle of affinity without distinction between males or females, except that males are preferred to females of equal position. The Dayabhaga has accepted a good many of these rules and has thus differed from the Mitakshara, but others are rejected on account of the introduction of principles of religion, foreign to the scope of the law of inheritance as it originally found place in Bengal. A great deal of anomaly has thus been caused by the introduction of the doctrine of religious efficacy—a doctrine in many respects irreconcilable with the law as laid down in the Dayabhaga itself. The rules of survivorship which essentially differentiate the Bengal school from the Mitakshara are expressly excluded in the tantra and the Dayabhaga, notwithstanding its tendency to orthodoxy, could not reintroduce it.

The commercial spirit of the newly formed nation in the eastern corner of the Indian peninsula with its deltaic character and nearness to the sea, the new ideas which other nations trading with it were bringing in every day, the necessary admixture of races in some parts of the country, the religion of Buddha which for centuries was here the religion of the sovereign as well as the people, and the influence of the Buddhistic tantras combined to bring about a law of property dissimilar in material respects from the rules propounded by the Brahmanical sages of old, and explained and commented upon in the Mitakshara and the books based on the

same. The Buddhistic tantras and the Hindu tantras which replaced Buddhism practically accepted this new law of property as consistent with the essential principles of the faith and ceremonies prescribed by them. The worship of the goddess Kali and the different forms of the goddess who represents feminine energy in nature was widely disseminated throughout the Bengal districts and Assam, Cachar and Sylhet, and the municipal law as enunciated in the most authoritative of the tantras must have been accepted by the people and administered by the Hindu Rajas for a long time. The greatest inroad was against the joint family system and its rules as to survivorship and want of power of alienation of individual members, because these rules were anti-commercial. The religion of the tantras also favoured the women. Brahmanical influence, however, commenced its work with the revival of the Brahmanical faith, and in the course of a few centuries affected the outskirts of a system of municipal law which had grown up under conditions peculiarly its own.

It is difficult to trace the history of any people from remote times, and it is almost impossible to trace with any degree of definiteness the sociological progress of the people now governed by the Dayabhaga school. When and how there were traceable indications of a revival, it is difficult to predicate. The materials are scanty and extremely imperfect. It is a mistake, however, to suppose that in ancient India kings made laws and promulgated them to the people as their command. Kings only administered the law which time-honoured sages had enunciated and custom had established and which learned scholars expounded and explained to the king to enable him to administer it. The customs and customary law of each locality were important elements for consideration in the administration of justice. The king could not ignore them. Law in India was moulded by custom and was enunciated by jurisconsults, if I may borrow the expression, and was not king-made. A king might occasionally ask a learned lawyer to compile a book on law for his own use and the use of the other scholars. A scholar might of his own motion compile a book on law, and such a book might be accepted as correctly laying down rules of law. But the king never made laws. It seems to me that the Hindu law, as now administered in Bengal, is customary law, as it prevailed in the province, with the exposition of learned Sanskrit scholars, who attempted to introduce into the old existing law or custom, principles and rules laid down by the ancient Brahmanical sages, and who introduced modifications, wherever possible, to make customary law consistent with original Hindu notions. The effect of Brahmanical influence did not, and

could not go further. The old type was retained in Brahmanical dress.

The work of revival began with the advent of learned Sanskrit scholars from the ancient seats of Aryan learning in the Mithila country and the North-Western Provinces of India. The Dravidian seats of Sanskrit learning are of later date. Scholars from Upper India began to pour into the new Hindu Kingdom of Bengal soon after the overthrow of the Buddhistic Pal Dynasty. They found the existing practices, the customary law of the people, to be at variance with the law as administered in the older Hindu provinces on the west and the north-west. The Mitakshara had been composed and had been accepted by learned lawyers as a correct exposition of the rules laid down by Yajnavalkya and other great sages, and it accorded no doubt with the existing practices of the people who had accepted it. Bengal was evidently then as now beyond the pale of the Mitakshara. The people had their own customary law, the product of circumstances peculiarly their own. I do not think that the Mitakshara was ever accepted as giving law to Bengal.

The learned Sanskrit scholars who were called upon to help the later Hindu rulers of Bengal in the administration of justice in civil matters found in the existing practices of the people much that had no warrant in the texts of Manu and Yajnavalkya and other sages and their accepted interpreters. In some matters there were semblances of authority in the texts of the sages. In the administration of justice, however, the king was bound to follow the customary law of each locality, as it is so ordained by the ancient sages themselves; and where customary law was reconcilable with the texts, there was not much difficulty. Where, however, they were inconsistent and where customary law could be definitely ascertained, the king had to give effect to it, notwithstanding express texts of the sages to the contrary. Where, on the other hand, custom or usage could not be definitely ascertained, or was not sufficiently ancient and uniform, the king had to apply the law his learned advisers knew and were familiar with, i.e. the Hindu law as laid down by the sages and its modern expounders.

Thus, for centuries, the Bengal law must have been in the process of development and was gradually conforming itself to the notions of the scholarly interpreters of Brahmanical law. Buddhistic principles, so far as they were anti-Hindu, were gradually losing hold on the people, but as regards certain matters the grip of Buddhism and of the philosophy and ceremonial rites of the tantras was hard to loosen. The family had given place to the individual, women had been recognized with certain restrictions as persons in law as much as men, married women had rights of the same

nature as men, and society could not go back to a more primitive stage.

The fourteenth and fifteenth centuries were the period of the renaissance in India. The influence of Moslem rule checked for a time the national growth. But the Moslem régime was not very interfering. During the long period of Moslem rule, the subordinate Hindu Rajas or Zamindars administered civil and criminal justice practically in the same way as if the Hindu régime had not only not disappeared but existed in its fullest vigour. A century of such a rule was not only sufficient to bring back peace and prosperity, but to revive the dormant ideas of the nation which was proud and properly proud of its ancient culture, literature, religion and law. In some respects, the germs of new life assumed considerably modified forms, notwithstanding the influence of ancient Brahmanical philosophy and thought. This was manifested by the appearance of heroes, whose principal aim of life was social and religious reform. Literature, especially poetry, tried to appeal to the people in their own dialects, and some of the richest gems of Indian literature belong to this period of renaissance. Society with its inherent caste system came under the new rules of *Kulinism* or social hierarchy. The activity in the revival of Sanskrit learning, its literature and philosophy, was also great, and it was also manifested in the region of law. The revival was the earliest in the Mithila country, and the *Virada Ratnakur*, the production of Chandeswar Thakura, the learned minister of Raja Hara Sinha, was composed and promulgated in the latter part of the thirteenth century. Bengal was backward in the race. It borrowed lights in literature and philosophy from Mithila and soon succeeded in making considerable progress. By the end of the fifteenth century the scholars of Bengal succeeded in producing a peculiar system of civil law which was expounded and consolidated in the great work that goes by the name of *Jimutavahana*. It was undoubtedly the production of a great master in the period of renaissance.

Of *Jimutavahana*'s biography and personal character nothing is known. The exact time of the publication of the *Dayabhaga* is hopelessly uncertain. It is even said that the name *Jimutavahana* itself is fictitious. Mr. Mayne says: 'It has been supposed that the *Dayabhaga* was written under the influence of one of the Hindu sovereigns of Bengal and perhaps even received his name.' Mr. Colebrooke, who is the greatest authority on Hindu law and its history, says: 'Of *Jimutavahana* little is known.' Dr. Jolly's conclusion is that *Jimutavahana* cannot be referred to a period earlier than the thirteenth century and is not later than the sixteenth (pages 21 and 22, Tagore Lectures). All that can be said.

with any degree of certainty is that the *Dayabhaga* was written after the publication of the *Mitakshara*, and that must have been at a period later than the eleventh century, and before the sixteenth century, when Raghunandan flourished and published his twenty-eight treatises on laws domestic as well as civil, including the *Dayatatwa*. A period of five centuries is too long for a date even in Indian chronology.

Mr. Golap Chandra Sastri in his preface to the *Dayatatwa*, published in 1904, says that Jimutavahana sprung from the Paribhadra family of Parigrama, situated on the southern bank of the river Ajaya in Bengal and was in or about the beginning of the twelfth century a minister of King Vishaksena. But the authorities he relies upon are very doubtful, and I am not prepared to accept them without further materials and corroborative evidence. We do not know of any king of the Hindu dynasties of Bengal of the name of Vishaksena. Assuming, however, Mr. Sastri's theory to be correct, Jimutavahana must have lived in the first period of Hindu revival in Bengal, after the suppression of Buddhist influence and before the advent of the Mahomedans. The twelfth century was also a period of great literary activity in Bengal. Its Hindu kings had then an extensive dominion. Literary men came in large numbers to their court and some of them left works of great merit which have come down to us as so many mosaics. The golden songs of Jayadeva alone are sufficient to immortalize the age. It is no wonder that the *Dayabhaga* was composed at this period, but the chaos and darkness of the first two centuries of Moslem rule did not permit its publicity and acceptance. Jimutavahana's great work might have been reserved for giving light in the period of renaissance in the fifteenth century.

The authority of Jimutavahana, whatever his age, was accepted, and his reasonings were generally considered by the learned as conclusive, so far as Bengal proper was concerned, before the end of the fifteenth century, the age of his earliest commentator, Srinath, being the middle of that century. His stern logic, his strict application of the time-honoured rules of interpretation, his tact in showing the consonance of the law as expounded by him to the ancient texts, and his masterly refutation of counter doctrines, soon obtained universal acceptance among the learned in Bengal, and his work became the fountain-head for all later Bengal lawyers. It seems to me, however, that the greatest merit of Jimutavahana's work lies in his attempt to harmonize the well defined customs in Bengal with the rules and principles that might be gathered from the approved earlier texts and commentaries on Hindu law. I am not prepared to accept Dr. Jolly's suggestion

(page 25, Tagore Lectures) that Jimutavahana followed the views of commentators earlier than Vijnaneswara. We do not know much of these commentators, and such of them as are known do not profess to maintain the peculiar doctrines enunciated by Jimutavahana. The rules of law adopted by Jimutavahana were far in advance of any that had been placed before the people by the text-writers and commentators referred to by him and whose works have come down to us.

I am not also prepared to accept the suggestion that the real author of the *Dayabhaga* stood in the same position to Jimutavahana as Tribonian did to Justinian. The analogy is without any foundation in fact, and has never been accepted by Indian scholars. Historians and antiquarians have failed to find out a king of that name in Bengal or any adjoining province. In fact, the Mahomedan conquest of Bengal commenced in the beginning of the thirteenth century, and historians tell us that it was completed in the course of half a century, and it would be idle to expect to find thereafter a Hindu king of influence and authority in Bengal, sufficient to promulgate with success the *Dayabhaga* of Jimutavahana as law. The reign of an influential and powerful Hindu king in Bengal after the first Mahomedan conquest, a king who could lay down a law for Bengal in supersession of the *Mitakshara*, which has been supposed by some to have been the governing law before the acceptance of Jimutavahana's rules and reasons, must be a phenomenon inconsistent with the known history of the province. The Hindu dynasties which ruled between the extermination of the Buddhistic power and the advent of the Mahomedans had no king of the name of Jimutavahana. Also it was not the ordinary practice in India to give the entire go-by to the name of a learned author and pass a work wholly in the name of the author's patron. Brahmanical scholars would also hardly accept as authority the words of a king, however great. As civil law in India was not the command of the sovereign to the people but the opinion of sages like Manu, Atri, Vishnu, Harita, Yajnavalkya and others, known as propounders of *Dharma*, or rules of conduct and opinions of their commentators, Jimutavahana might be the fictitious name of a real Brahman scholar, but it could not be the name of a king by whose command the law was compiled and expounded.

Subsequent generations, however, are not so much concerned with an author, and even his age, as with his work, and we may pass over the debatable ground without further comment. Jimutavahana gave on the current ideas of learned lawyers of Bengal in his days the impress of his great and acute intellect, and perhaps succeeded in modifying them to some extent. His work is a monu-

ment in itself, a landmark of the greatest importance in the history of the Bengal school of law, irrespective of its date and real authorship.

There is also no reason for the hypothesis that Jimutavahana was fighting in favour of a theory only, a shadowy and imaginary system, which he wished should be adopted in supersession of the established system. He was also not trying merely to reconcile conflicting texts of ancient sages. The method of discussion by him leads to a different conclusion. It is more logical to suppose that he was attempting to hold up an existing state of things and show its basis on the ancient Hindu texts and its consistency with Brahmanical notions. In doing so he had to refute counter propositions put forward by other learned lawyers, especially in the provinces to the west where Brahmans had always the largest influence. The view I am disposed to take is consistent with the approved historical basis of juridical ideas, and the elaborate disquisitions contained in the *Dayabhaga* itself. There is an appearance of truth in the remark made by an eminent lawyer that 'rules of succession to property being in their nature arbitrary, are in all systems of law merely conventional.' But a deep insight into the history of a people, and a close examination of the influences that have been brought to bear in the course of its progress from the remotest time, will show that 'rules of succession' are not necessarily arbitrary or merely conventional. In ancient society they were seldom, if ever, the mere commands of a sovereign or the resolutions of the congress of the learned or the people. Sociological science is highly complex, and facts which tend to give direction to sociological ideas are generally difficult to ascertain; and what is really the necessary consequence of a given state of facts appears in some cases to be arbitrary to the casual observer. This is especially so in India, where law was never supposed to be the command of the king and where customs and customary law had express precedence over even the rules laid down in the sacred texts.

The patriarchal system had, as I have shown, lost its hold in Bengal centuries before the advent of Jimutavahana, and he begins the first chapter of his great work with a disquisition relative to acquisition of right and partition. He tries to controvert the old theory of *unobstructed* heritage and consequent acquisition of right by birth as it finds place in the *Mitakshara*. Unobstructed heritage is the main stay of the true joint family system and coparcenership and the necessary doctrine of right by survivorship. Jimutavahana had to give the basis of ancient texts to the opposite view—the only view consistent with the known established

customs and usage in Bengal. He did it by adroit manipulation of the texts. It is impossible to accept the idea that a man of his genius and learning was expounding his own theory based on the reading of ancient and approved texts which I cannot but characterize as misreading. He was supporting a prevailing system which required the authority of texts of even doubtful interpretation for support. He takes a side and finds his way somehow to support it, and thus gives the prop of ancient texts to the current notions in Bengal as to coparcenership and the right of alienation.

Jimutavahana's theory of the right to inherit as depending upon the capacity to perform the periodical funeral ceremonies is equally untenable. He accepts the text of Manu 'To the nearest Sapinda the inheritance belongs,' and interprets the word *Sapinda* to mean 'persons connected by the gift of funeral cakes offered at such Sraddhas.' This is a legitimate interpretation of the word, and the only one that could be accepted to support to some extent the rules of inheritance that had obtained solid footing in Bengal. The rules of succession of sons and grandsons required no support. They were universal in India. They were supportable on any interpretation of the texts. But then comes the widow in default of sons and grandsons, the daughter in default of sons, grandsons and widow, the mother and the grandmother in default of specified nearer heirs. The theory of spiritual benefit admittedly fails in these cases. Females other than the widow, daughter, mother and grandmother were deprived of their right of inheritance in the Dayabhaga. The Mahanirvana-tantra would have the daughter-in-law, the sister, the maternal aunt and other female relations in the line of heirs. The right given to these female relations is consistent with the principle of affinity expressly laid down in the tantra. The Mitakshara does not expressly exclude them. Kamalakara, the leading authority of the Western Maharasthra school, recognizes the sister's right of succession, and the interpretation of the word *Sapinda* as accepted in *Lallu Bai v. Ram Kuver Bai* (I. L. R. 2 Bom. 422) and *Umaid Bahadur v. Uday Chand* (I. L. R. 6 Cal. 119) would bring in all the other females mentioned in the tantra. Jimutavahana says that the succession of the widow, the daughter, mother and the paternal grandmother takes place under the express texts. The theory of spiritual efficacy fails in the case of all female relations, but I think customary law in Bengal had been too firmly established in the case of the widow, the daughter, the mother and the paternal grandmother, and the theory of spiritual benefit was not sufficiently strong to defeat their claims to heirship. The instances of succession of other female relations must have been few and far between. The number of instances could not have been

sufficient for the establishment of custom, ancient and uniform in case of other females, and Jimutavahana could easily throw them overboard and maintain the consistency of the theory propounded by him.

Property in the hands of females has been said to pass more easily to the sacerdotal caste, and this is said to be the reason why four of the female relations of a deceased owner were introduced in the line of heirs; but why were the rest excluded? The true reason of their exclusion is obvious. The object of Jimutavahana and the learned lawyers who accepted the rules and principles laid down by him was to bring the customary law of Bengal within the pale of the texts of the ancient sages. Brahmanical influence had operation here only, and some persons who should according to ordinary recognized notions have come in were excluded, as they were unfortunate in having no texts to support their claims or firmly established customs to help them. The theory of spiritual benefit was introduced to establish the heirship of the daughter's son, the sister's son and the like in preference to distant agnatic relations, but it failed as regards female relations.

The later history of the progress of the Bengal school is necessarily short. Jimutavahana's arguments and conclusions were accepted by the learned lawyers of Bengal as generally correct. The rules given in the tantras were ignored by them. Srinath Acharya Churamani and Sri-Krishna Tarkalankar elucidated by their comments the texts of Jimutavahana, and the latter published an excellent compendium of the Bengal law, called the *Dayakarma Sangraha*. Achutya and Maheshwara followed Churamani.

But the most influential exponent of the Dayabhaga was Raghunandana Smarta Siromoni of Nadia. His works were read by all learned lawyers in Bengal, and his Dayatatwa or treatise on the law of inheritance, which has been translated into English by Mr. Golap Chandra Sastri, was in the hand of every Sanskrit scholar, and afforded an easy means of expounding law. The learned teachers in every Sanskrit school (and there were many in Bengal) took the Dayatatwa as their textbook on law, and it thus established the doctrines of the Dayabhaga throughout the province.

The Anglo-Indian Courts established in Bengal in the latter part of the eighteenth century acted on the opinion of Sanskrit scholars who were supposed to be the repositories of Hindu law and who acted as assessors for its exposition. They were called Court pandits, i.e. Hindu scholars employed to help the Courts. Halhed's code of Gentoo laws was a translation of a code compiled by Sanskrit scholars under the direction of Warren Hastings, the first Governor-General of India. The greatest of these scholars in the

latter part of the eighteenth century was Jagannath Tarkapanchanana, the author of the *Vivadabhangarnava*, the translation of which in English is known as Colebrooke's Digest. Jagannath attributed to the Dayabhaga an extraordinary authority, and his views were accepted by the Anglo-Indian Courts in Bengal. Judicial notice was not taken of the tantric or other codes of customary law. India was a civilized country when Great Britain obtained its mastery. To use the words of Lord Kingsdown in the *Advocate-General of Bengal v. Ranee Surnomoyee*, 9 M. I. A. 387, it was 'a very populous and highly civilized country.' Englishmen in India were bound to ascertain and administer to Indians their own laws. But India had no territorial law. The laws of inheritance were personal. Migration from one province to another did not ordinarily affect the personal law of the person migrating. But there were difficulties in the earlier days of British rule in India about discovering the laws. There were codes of law and commentaries, but they had not the effect of *lex loci*, and it was not known to whom they applied. All the codes and commentaries were not also discovered at first, and many are yet sealed books to lawyers. There were also unwritten laws and customs. The learned scholars of Nadia had things in their own way for a long time. They dictated law according to their own lights, confining themselves to books they knew. The Punjab has its customary law, but the British conquest of the Punjab is of recent date. The conquest of the Punjab took place nearly a century later. The customary law was traced in that province, but customary law in Bengal was entirely ignored. So great was the indifference to ascertaining customary law that it is curious that Hindu law, as we find in textbooks, was administered for a long time to people who are not Hindus. They had their own customary law which remained, and still practically remains unnoticed by our Courts. In *Fanindra Deb Rai Kat v. Rajeswar Das*, L. R. 12 I. A. 72, which is a case on adoption, the Judicial Committee of the Privy Council pointed out that the family to which the parties belonged were not originally Hindus, and the Hindu law of adoption was not applicable to it. The remark is equally applicable to many more cases, in which, though the Hindu law of the sages and textbooks may not be applicable, ignorance or idleness shuts out inquiry into customary law, and leads to the application of the easily accessible system to be found in some of the textbooks of Sanskrit scholars. This has been so from the beginning of the administration of civil justice in Anglo-Indian Courts, but ignorance more than idleness played in the earlier days an important part. In many matters, judicial utterances, extending over a period of a century and a quarter, have

stereotyped the law, and the people have been, though unwillingly, accepting it. The *curtus curiae* is already too strong in these matters. But in many others there is still a means of retracing steps and examining the customs and customary law and settling the judicial administration of the country on the sounder basis of the consent and approbation of the people to whom law is administered.

SARADA CHARAN MITRA.

EXTRACTS FROM THE MAHANIRVANA-TANTRA.

CHAPTER XII.

9. If a man dies leaving a son, grandson, daughter, father, mother, and wife, the son alone is entitled to succeed and not any of the others.

10. If there are many sons, they divide equally, except kingship, which goes to the eldest, and that is according to the usage of each family.

11. The debts of the father should be satisfied from the property left by him. Property is not divisible until the debts are paid.

12. If they divide and take the father's property (without paying his debts), the king should take from them property sufficient for the purpose, and cause the debts to be paid.

13. As men go to hell only for their own sins, the man himself is bound for his own debts and not others.

14. The sharers are entitled to their respective shares of all common property, immovable as well as movable.

15. Partition may be effected by mutual consent. But if the sharers do not do so, the king must divide equally without partiality.

16. If any immovable or movable property be incapable of partition, the king shall divide and give to each sharer its value or otherwise regulate the enjoyment of its usufruct.

17. If after partition another sharer appears, and proves his claim, the property should be again divided, and such co-sharer's share should be given to him.

18. If, O Goddess, the co-sharers quarrel about their shares after partition by consent, they should be punished by the king.

19. If the deceased has left a grandson by a predeceased son, a widow and parents, the grandson succeeds on account of his affinity by birth and his being in the descending line.

20. If the deceased has left no son or grandson, but has left his father, brother, and grandfather, the father succeeds on account of nearness by birth.

21. If the deceased has left a grandson by a predeceased son, and daughters, who are nearer by birth, the grandson succeeds, as males are preferred to females.

22. If the deceased has left a son and grandson by a deceased son, they

divide his wealth equally, as the son is considered to be the representative of his father.

23. If the deceased has left no sons or grandsons, the wife married in the Brahmo form has preference and succeeds, as she is half of her husband's body.

24. But the sonless widow succeeding to her deceased husband's wealth is not competent to make a gift of it nor to sell it. She may do so as regards her separate property.

29. If, O Goddess, there are more virtuous widows than one, they enjoy the wealth of their deceased husband equally.

30. If the deceased left a daughter, the property left by him returns to his estate after his widow's death, and comes to the daughter.

31. If the daughter being alive, the property goes to the son's widow, the daughter gets it on the demise of the latter through the latter's father-in-law.

32. If, O Goddess, the property of a man was inherited by the mother, and if on her death her father-in-law, that is her son's grandfather, be alive, the property goes to her father-in-law through his son and her husband.

33. In the same way as the father may be his son's heir, so if the father be dead, the mother inherits.

34. If the mother (*Janani*) be alive, the step-mother cannot inherit. On the mother's death, the property goes to the step-mother through the father.

35 and 36. When, in the absence of heirs in the descending line, the property goes to the ascending line, the principle of inheritance is the same as in the descending line; and, therefore, if the sister inherited property in the presence of the father's brother, and if the sister dies childless, even if her husband be alive, the property goes to the father's brother.

37 and 38. The male is, as usual, preferred to the female in the descent of property after its ascent, and, therefore, the half-brother inherits in preference to the sister; and even if the sister be alive, the sons of a half-brother would inherit.

39. If the deceased left a full-brother as well as a half-brother, they are equal sharers by virtue of their sonship to the father of the deceased.

40. If the daughter be alive, her son is not an heir; she is a bar to his inheritance, and inheritance goes after the bar is removed.

41. The daughters divide the father's wealth in the absence of sons. But the expense of the marriage of an unmarried daughter must be met out of the joint paternal wealth.

44. If the paternal uncle's widow and the father's step-mother be alive, the property goes to the paternal uncle's widow through its vesting in the paternal grandfather and then his son.

45. If the paternal grandfather, the paternal uncle, and the brother be alive, the brother is the heir; as preference should be given to a person lower in descent.

46. The brother and the paternal grandfather are both nearer in affinity than the paternal uncle. Still the wealth of a deceased is supposed to vest in the father and passes to his descending line.

47. If the deceased has left his father as well as his daughter's son, the latter is his heir and not the former, as inheritance vests in the descending line.

48. If, O Kalika, both the father and the mother be alive, the father is the heir, as males are preferred to females.

49. Notwithstanding the presence of the maternal uncle, the *Sapindas* of the father of the deceased inherit because paternal relations are preferred.

50. O Goddess, here the wealth goes to his heirs as the ascending line in the absence of heirs in the descending line, and then, again, as males are preferred to females, the maternal uncle, though nearer in affinity, does not get wealth, but it goes to paternal relations.

51. O Parvati, if there be a son and a grandson by a son who is dead, the grandson gets his father's shares equally with his paternal uncle.

52. If the daughter of a deceased son has no brother, and if her mother also be dead, and if she is chaste, she inherits her grandfather's wealth equally with her paternal uncle.

53. Even if her paternal grandmother and the father's sister be alive, the grand-daughter by a deceased son gets the inheritance, the property being supposed to vest in her father.

54. Preference is given to a male in a dispute with a female in the same ascending and descending line. Otherwise there is no preference given to a male.

55. It is for this reason, O Love, that the wealth of a deceased is not capable of being inherited by his father in the presence of his daughter-in-law, his grand-daughter, and daughter.

56. If the deceased has no heir among his paternal relations capable of inheriting, his wealth goes to his maternal relations, according to the rules already enunciated.

57. When property goes to maternal relations, it is inherited by the maternal uncle, his son and others according to the rules as to ascending and descending lines, and males and females as stated above of paternal relations.

58. Whether wealth be divided or undivided, the heirs of a deceased inherit his wealth according to the ascertained interest of the deceased himself.

CHANGES IN THE LAW OF HUSBAND AND WIFE.

THE phrase 'The swing of the pendulum' becomes nauseating by repetition when there is any prospect of a General Election: but it is such an easy metaphor to indicate the change from one extreme to another, that it is not likely to fall into disuse. Pendulums oscillate in accordance with their length, and tendencies have varying periods before they take practical effect. That which turns public opinion from one political party to another may have an amplitude of a few years; but there are many slower movements hardly perceptible until observant persons find that by degrees and almost unnoticed a great displacement has been effected. In legal matters there are two or three well-marked examples, such as the law relating to debtor and creditor. Formerly debtors used to find themselves in prison; now one with a good working knowledge of the Bankruptcy laws has been known to make a fortune out of his creditors, and it seems likely from such a climax that any further change will be in the direction of greater stringency, especially in large bankruptcies. But perhaps the best instance of oscillation is the law of Husband and Wife, the period being about a century. A century ago a wife's legal rights were few and inadequate; but now in certain circumstances a husband may have none whatever. Unjust as the old law might have been, it made the wife's helplessness the means to an end; the present law is the effect of a series of independent experiments to which a resurrected Solon might apply the word 'chaos' without being misunderstood by Englishmen.

By the law of a century ago the husband took the wife's property, and she was practically bound to live with him; and the two first victories of the wife in the legal arena seem to have been the recognition of deeds of separation in the Common Law Courts and in Equity, and the device of the restraint on anticipation when it appeared from cases like *Pybus v. Smith*, 3 Bro. C. C. 339 (1791), that the separate use unrestrained did not fulfil its purpose. The series of decisions by which the enforceable right of separation was recognized well illustrates the struggle between the old principle and the new. The latter registered a victory so long ago as 1792 in *Guth v. Guth*, 3 Bro. C. C. 614, in which Sir R. P. Arden, the Master of the Rolls, held that the covenant for separation

was enforceable; but the time was 'hardly ripe, and the later decisions of *Legard v. Johnson*, 3 Ves. 352 (1797), and *St. John v. St. John*, 11 Ves. 525 (1805), much weakened this authority. In the last case Lord Eldon declared 'it is impossible specifically to perform such an agreement,' and suggested that 'after the sacred contract they (the husband and wife) should feel it to be their mutual interest to improve their tempers.' However, in *Warrall v. Jacob*, 3 Merivale 256 (1817), the simple device of the trustee for the wife practically restores the power of separation, and the principle is recognized and established in 1848 in the case of *Wilson v. Wilson*, 1 H. L. C. 538, 73 R. R. 158.

Thus before the middle of the last century the 'restraint on anticipation' had become common form in marriage settlements, securing the wife's income to herself, and the wedge of the separation deed had been driven firmly into the old ecclesiastical fabric. A still fiercer blow was struck when the first Divorce Act was passed in 1857.

The former private Divorce Acts, by which a rich man could get a divorce *a vinculo* and marry again, seemed to give the change a reasonable basis, making the remedy for unfaithfulness independent of wealth; but it entirely revolutionized the law, making a very unlikely contingency in the cases of certain well-to-do couples a necessary implication in all marriages. And moreover, although it is still assumed to be unlawful to contemplate a future separation, the law with a curious inconsistency forbids parties to enter into an indissoluble union, for there is no provision in the Divorce laws to enable spouses to 'contract out' of their operation¹.

Several amending Acts have been passed since that of 1857, principally for improving the machinery of the Court, and reported decisions show the practice; the power to vary settlements was perhaps the most important innovation until 1884. But s. 21 of the principal Act, making lawful the 'Protection order,' was a step in the direction of curbing the husband's dominion over his wife's unsettled property, followed some time after by the Married Women's Property Act of 1870, which still further enlarged the wife's powers in this direction, and diminished the husband's.

Up to this point the latter had, perhaps, not very much reason to complain of the way the law had modified his rights; the 'restraint on anticipation,' the 'equity to a settlement,' and the Act

¹ [If the incidents of the married state could be regulated at the will of the parties, there would be no need for any Divorce Act at all: if they could fix the term of marriage for life to the exclusion of any interference from the Court, why not for ten years, or five, or one?—Ed.]

of 1870 merely put a check on inordinate selfishness, and the recognition of separation and the Divorce Acts in theory held an even balance between the sexes, though in practice the separated wife is a more privileged person than the husband who maintains her without the right to her society. But the pendulum at the bottom of the swing was not at rest, and the further encroachments, though sometimes in logical sequence, nearly all tended to put the husband in an unfair position.

From 1870 to 1882 his rights were not subject to any further onslaught of a serious nature; but the conversion of the 'restraint on anticipation' into a possible engine of fraud on a married woman's creditors was foreshadowed in 1878 by the case of *Stanley v. Stanley*, 7 Ch. D. 589. The effect of this was to protect a married woman who cheated her creditors, on the ground that she was at all costs to be protected against her husband cheating her.

It must be admitted that this was to treat her as a person fitted for little or no responsibility; nevertheless four years afterwards the Married Women's Property Act of 1882 was passed, giving her entire control over her property to the exclusion of her husband. This Act did not relieve him of the burden of maintaining her, which was in effect a right against his earnings and property, and thus the wife could enjoy her own property and part of the husband's, and he was left only with the remainder of his own.

In 1883 the unhappy domestic affairs of Mr. and Mrs. Weldon culminated in the latter serving her husband with a writ for libel, and simultaneously claiming the right to his society; his offer to provide her with a house, servants, and allowance was declined in the absence of his company. The Court held that he was in contempt of a previous decree for the restitution of conjugal rights, and liable to go to prison unless he accepted her invitation.

This case was deemed a hard one, and, ignoring the old adage, the legislature passed the Matrimonial Causes Act of 1884, enjoining that no one should be sent to prison for disobeying such a decree. The case of Mr. Weldon went to prove that it was sometimes unjust to send a husband to prison for this technical contempt; it was assumed that it would therefore always be unjust to send a wife to prison in similar circumstances.

By a decision in 1886, *Seroka v. Kattenburg*, 17 Q. B. D. 177, it was held by Mathew and A. L. Smith JJ., that the husband, notwithstanding that he took no interest in his wife's property, remained liable for her torts. Under the old law, when he took her property, this liability followed as a matter of logic and equity; after the Act of 1882, though the judges might not have had an option in the matter, the result of the decision (though

in point of law it stands confirmed by the Court of Appeal in *Earle v. Kingscote* [1900] 2 Ch. 585) seems absurd. By a handful of insulting postcards a spiteful woman might now ruin her husband without danger to herself civilly, if her income was properly settled and restrained.

Underlying this decision and the old law on which it was based was doubtless the notion that the husband had some sort of legal control over his wife; and at this time the old case of *Re Cochrane* (8 Dowl. 630, 1840) stood to show that he was entitled in the last resort to enforce this control physically (it is to be observed that after 1882, when he had ceased to have any interest in her property, this was the only way he could enforce it). But a few years afterwards, in 1891, independently and within a week, two cases were decided which finally destroyed the last vestige of the husband's authority. By the 'Clitheroe case,' *R. v. Jackson* [1891] 1 Q. B. 671, it was decided, overruling *Re Cochrane*, that a husband had no right to restrain his wife's movements, unless, possibly, she was about to elope with another man; and in the case of *Michell v. Michell* [1891] P. 208, the Court of Appeal (Lindley, Bowen, and Kay LJJ.) decided, reversing the decision of the late Lord St. Helier in the Divorce Court, that a husband who has obtained a decree for the restitution of conjugal rights cannot enforce it under the Divorce Acts against a wife's restrained income.

The decision in *R. v. Jackson* may have been inevitable after the Act of 1884, and that in *Michell v. Michell* also obligatory on judges unable to cope with the overgrown child of their predecessors, the 'restraint on anticipation'; but the net result remains that a husband's decree for restitution is generally worthless, and the Court which has no option but to pronounce it is stultified every time it does so. If a Court finds that a woman has left her husband against his will, the natural inference is that he has no control over her; but directly a question as to the 'restraint' is raised, the judges have to assume that, unless they protect her, he will at once persuade or coerce her out of her money. An English wife has therefore all the privileges of a man or a single woman as regards her person and unsettled property, and the protection accorded to a child as regards her settled property.

This anomalous situation might well have been dealt with by the Married Women's Property Act of 1893; but the first section of this Act expressly preserves the 'restraint' inviolate, and the effect of it, even after the husband's death, is well seen in such cases as the recent one of *Brown v. Dimbleby* [1904] 1 K. B. 28, where the 'restraint' operated in favour of a widow, because the debt had been incurred during the husband's lifetime.

However, s. 2 of this Act shows that one class of married women had managed to stretch the restraint to breaking point, and the 'lady litigant' cannot now reckon that it will carry her immune through the ordinary rule that an unsuccessful plaintiff is liable to pay the defendant's costs. This at least puts the creditor *malgré lui* in a more reasonable position than when he had to incur expense to protect himself from an antagonist who had nothing to lose.

During the progress of the wife's independence and emancipation, the practice of the Divorce Court exhibits an almost similar spirit of chivalry, though perhaps *dum casta* and *dum sola* qualify alimony a little more often than they did twenty years ago. The notion sometime prevailing that to insert the *dum casta* clause was to insult a virtuous woman, seems somewhat akin to regarding the Statute of Frauds as an insult to the honour of contracting parties. But at the present day an honourable man does not object to binding his pledge by law, and there seems no reason why an honourable woman should object to such an obviously just condition. The effect of the omission of the *dum casta* clause is considered in *Bradley v. Bradley*, 7 P. D. 237, and the clause itself is discussed in *Wood v. Wood* [1891] P. D. 272. In the slight reaction which has taken place, perhaps such a case as *Harrison v. Harrison*, 12 P. D. 130, would now be differently decided on this point.

There is also a general impression that the Divorce Court is not unduly stringent in finding 'cruelty' against a guilty husband, and so in effect facilitating a wife's divorce. No doubt there seems a specious injustice about the fact that a husband can get a divorce in circumstances where a wife would only be entitled to a judicial separation; but it must not be forgotten that a woman who divorces her husband is in a far better position than a man who divorces his wife, for whereas the respondent wife is simply freed from her fetters (and therefore in just as good a position as the petitioner husband) the respondent husband is still saddled with his burden of maintenance. Moreover a guilty wife is frequently given a small allowance, as in *Clifford v. Clifford*, 9 P. D. 76, and *Lander v. Lander* [1891] P. D. 161: but from *Gladstone v. Gladstone*, 1 P. D. 442, it would seem that in the converse case, however wealthy the wife or needy the husband, no such concession could be made to the latter.

To the long series of feminine victories in legislature and forum which took place in the nineteenth century, the twentieth has added one which may be mentioned, though it is of very little practical importance. In *Cowley v. Cowley* [1901] A. C. 450, it was decided that a divorced husband (in that case a Peer), whose wife had

re-married, had no legal right to prevent her retaining her previous name.

At present therefore the general result is that a wife with settled property is not legally bound to her husband, for the deterrents of possible imprisonment, loss of income, and lawful physical restraint have successively been removed. That of possible imprisonment has also been removed in the case of the husband, but he is liable to lose a considerable proportion of his own income. Two very simple remedies seem applicable in these circumstances. In the first place, the Court should have power to order that the income of a woman who has deserted her husband should be paid to him whether restrained or not until further order, which could be made as of right in the wife's favour when the Court was satisfied that she had returned with the *animus manendi*. By this means anticipation would still be prevented, while the Court regained some control over women who refused to do their duty. In the second place, the unchangeable facts of nature should be realized anew, and it should be recognized that the wife's primary duty is to live with her husband, and that if she refuses to perform it she is quite as culpable as the husband who neglects to perform his primary duty of maintaining his wife. His primary duty; for though a man who gives his wife a proper allowance but refuses to live with her may be much to blame, her position is not so bad as that of the deserted husband whose wife fulfils no duty whatever to him. From this it seems clear that, from nature's own reasons, the deserting wife is more culpable than the deserting husband (assuming that the latter fulfils his duty of maintenance) and that if there is to be any discrimination, should be more heavily punished. But if the power to imprison should be revived (it was very seldom actually exercised), it could be made to apply to both sexes, and the Court would then have power to prevent innocent persons suffering because others chose from caprice to break their contract. It might be urged that a woman who preferred indefinite imprisonment to living with her spouse would cause a difficulty; but such cases would be extremely rare. One at least seems to have occurred under the old régime, that of Mrs. Barlee in 1822 (reported 1 Addams 301), in which the Court had no discretion but to keep her in prison for her continued contempt. A new statute should give the Court a discretion in the matter, so that a respondent in contempt could be kept in prison or released as circumstances dictated.

These two small reforms would restore to the Court its power to deal with this very important matter, and would prevent the injustice of matrimony becoming a compulsory celibacy for any one who desired to avoid this state. Even now, it is legally held a matter of public

policy for the spouses to live together, as is exemplified by cases such as *In re Moore*, 39 Ch. D. 116: the cases of *R. v. Jackson* and *Michell v. Michell* are directly in conflict with this principle.

A minor grievance may here be mentioned, which one well-known writer desires to see removed, that of the practical disappearance of dower which, for the reasons he states, he considers is now too easily defeated. But the questions of dower, of the 'estate by curtesy,' and of the *pars rationalis* are rather of the liberty of testamentary disposition, which is much greater in England than in most other countries.

The question of a contract expressly indissoluble is one in which the Churches should have a voice; the possibility of divorce certainly gives an artificial ring to a considerable portion of the Church of England marriage service. And to remedy the inconsistency noted above, that possible divorce is an implied condition which cannot be evaded, but separation must not even be alluded to in express terms, a possible separation might be made the subject of bargain in a dissoluble contract. Though as to this, a fairly ingenious practitioner, with the recent cases of *Re Hope Johnstone* [1904] 1 Ch. 470 and *Re Crawford* [1905] 1 Ch. 11 before him, might not have much difficulty in framing provisos to this end, assuming that these cases are approved in superior Courts.

As regards the rights and liabilities of the spouses as such in their relations to third persons, the laws which regulate their dealings with their children and creditors are the most important. And with respect to those affecting the children, the jurist with a passion for consistency may have less fault to find with the developments of the nineteenth century than in respect of the law of the spouses *inter se*. In each case the husband has lost and the wife has gained, but in the latter the wife is not enabled to take her children away from her husband when she likes, which would be the equivalent of *R. v. Jackson*. The father's common law rights have, however, been considerably encroached on in favour of the mother in the Guardianship of Infants Act, 1886 (as well appears in the case of *Re A. & B. infants* [1897] 1 Ch. 786 before Chitty J.), and in favour of third parties by the Custody of Children Act, 1891.

But the last-mentioned Act keeps as sacrosanct a doctrine of the Ecclesiastical Law that seems to have no reason for its survival that could not equally be applied to that discredited in *Wilson v. Wilson*. When the husband had such dominion over his wife and family, his wishes as to the religion of the latter might have been paramount; but, according to present notions, a man who induces a woman to marry him by the promise that their children shall be brought up in her own religion, ought to fulfil it when the time

comes. On this footing the case of *Re Agar-Ellis*, 10 Ch. D. 49, would have to be overruled or modified by statute.

The very large control of the Divorce Court as to children after decree pronounced is discussed and compared with that of the Court of Chancery by Lindley L.J. in *Re Thomasset* [1894] P. 295, and the right of the Court to interfere with a child over sixteen at the instigation of its father and against its own will is also broached. But perhaps a more burning question is whether in the present day the Court should have power permanently to separate mother and child for any reason other than a breach of maternal duty. In one or two recent cases ladies have broken their undertakings and have taken their child abroad, preferring to live in voluntary exile rather than submit to such a separation, and public sympathy has been unmistakably on their side—though it may be that emotion of this sort is an unsafe guide to legislation.

As regards his step-children, a husband since 1834 has had the burden of maintaining them, whether legitimate or illegitimate; a charge on the wife's property acquired during coverture for this expense would seem equitable (and such a charge might also lie for money paid over to a creditor recovering under a judgment in respect of a tort committed by her).

Unsecured creditors of both husband and wife have still some valid reason of complaint against a state of the law which permits a couple to live in affluence and to get credit without any property liable to be taken in execution for debt; but this is no new development. That the 'consideration of marriage' is what the parties choose to make it, and can be used even by a man on the verge of bankruptcy to override creditors is strikingly shown in the case of *Kewan v. Crawford*, 6 Ch. D. 29; that creditors can be defeated by arrangements of which they are entirely ignorant is clear from *Morel Brothers v. Earl of Westmorland* [1904] A.C. 11, an even stronger case than *Debenham v. Mellon*, 6 App. Cas. 24. By the ancient law a wife's property, if unsettled and reduced into possession, was liable to the last farthing for her husband's debts; by the present law and appropriate settlements it is liable to neither his nor hers, and even the husband by well-known devices can enjoy his own property to the detriment of his creditors. This sanctity of settlement certainly tends to lower credit and might with advantage be modified, even if the novel principle of a maximum settlement as against creditors has to be applied. A very large difference in several disgraceful bankruptcies would have been brought about by this method. And if the principle of *Lady Bateman v. Faber* [1898] 1 Ch. 144, is kept, that a married woman cannot estop herself to bind her restrained income, that of *Stanley v. Stanley* seems beyond the point

where the line can be legitimately drawn. A woman fitted for the responsibilities put on her by the Married Women's Property Act ought to take the consequences of letting herself be persuaded into sheer fraud. See too *Re Reis* [1904] 2 K. B. 769, C. A., affirmed in H. L. [1905] A. C. 442.

In conclusion, the whole law on this subject wants revising, not so much by amending details as by being put on a consistent basis, with consistent underlying principles. That a woman ought to have great responsibility, that she ought to have no responsibility whatever, that the spouses must not contemplate separation, that a wife shall be perfectly free to leave her husband if she wishes, that one or other or both ought to be liable for the expenses of their joint household, that neither of them need be, are contradictory propositions for each of which the cases and statutes quoted above stand as authority. And it is submitted that such bewildering paradoxes, however suited for the region 'Where nice is nasty, nasty nice; Where vice is virtue, virtue vice,' would be out of place in the law of any country at any time, and *a fortiori* in England at the opening of the twentieth century.

ALFRED FELLOWS.

NOTES ON MAINE'S 'ANCIENT LAW' (*concluded*)¹.CHAPTER VI. Note M. *Testamentary Succession.*

THE burden of this chapter is that the Will or Testament of modern law, with its specific characters of being secret, revocable, and posthumous in operation, is unknown to archaic law, and is of comparatively recent introduction wherever we find it. Maine's position is amply confirmed by later historical research, and one or two seeming exceptions which he felt bound to notice have been removed.

Jurists of the seventeenth century, we read in Maine's text, resorted to the law of nature to explain and justify testamentary power. This is almost enough of itself to show that no such power was commonly found in customary law. For the doctrine of natural law was, as we have already seen, a progressive and rationalist doctrine. Its use was to override the commonplace objections founded on lack of authority or even on the existence of contrary custom; and at the time of the Renaissance and even earlier it served speculative publicists in much the same way as the principle of utility (with which it has considerable affinities) has served modern reformers. In fact, the whole conception of individual succession to property, even without a will, is relatively modern. The archaic Indo-European family was, Maine tells us, a corporation, of which the patriarch for the time being was the representative or public officer—or at most, we may add, managing director. Evidently we are not meant to take this statement as if a definite legal doctrine of persons, much less artificial persons, was to be ascribed to the patriarchal stage of society. For in that stage, as Maine also says, a man was not yet regarded as an individual, but only as a member of his family and class; and this is still true to a great extent in Hindu law. Now the modern doctrine of corporations assumes that the 'natural person' or individual, considered as a subject of rights and duties, or 'lawful man,' as our English books say, is the normal unit of legal institutions, and that the collective personality of a group of men acting in a common interest or duty and behaving like an individual is something which

¹ A new edition of 'Ancient Law' containing these notes and an introduction will be published forthwith by Mr. John Murray.

needs to be explained. But for archaic society the collective body and not the individual is the natural person.

We find the same conditions existing in full force among the German tribes in a much later period of time than that which Maine is directly considering in this chapter. A recent learned writer in France, dealing with precisely the same subject as it occurs in the mediaeval history of French law, has forcibly contrasted the Roman conception, as it was established in the classical law of the empire, with the German.

'Le droit romain consacre le triomphe de l'individualisme; la volonté personnelle du chef de famille, voilà le facteur juridique essentiel, l'agent de toutes les transactions, la force créatrice de tous les droits. Cette volonté est si respectée et si puissante, qu'elle continue d'agir après la disparition de celui qui l'a exprimée. Le père règle le sort de sa fortune et de sa famille pour le temps où il ne sera plus, et cela par un acte souverainement libre, qu'il est toujours à même de modifier. . . . L'individu *sui iuris* est, dans le monde romain, l'unité juridique et sociale.

Chez les Germains, c'est bien plutôt la famille. Il serait sans doute excessif, surtout pour le temps des *Leges* [the customals collectively known as "*Leges Barbarorum*"], de déclarer en termes absolus que la famille est tout et que l'individu n'est rien; la vérité sous cette forme serait exagérée et dénaturée. Mais il est certain cependant que l'exaltation de l'individu est beaucoup moins complète qu'à Rome, et que d'autre part la famille forme une association, une sorte d'être collectif armé de droits inconnus des jurisconsultes de l'Empire. L'énergie individuelle est limitée dans le temps, et les Germains ne peuvent pas concevoir qu'elle s'exerce au delà de la tombe; sitôt l'homme mort, toutes ses volontés s'évanouissent. Au même moment ses prérogatives juridiques sont recouvertes et absorbées par celles de ses parents, car de son vivant même sa famille jouissait de droits autonomes qu'il ne dépendait pas de lui de supprimer: sa mort les développe, mais elle ne les crée pas.' (Auffroy, *Evolution du testament en France*, Paris, 1899, pp. 173-4. Cf. Brunner, *Grundzüge der deutschen Rechtsgeschichte*, § 56: Das germanische Erbrecht war ein Familienrecht. For examples of analogous customs among various uncivilized tribes, see Lord Avebury, *Origin of Civilisation*, 6th ed. pp. 489-91.)

The suggestion in Maine's text of regarding the Roman ancestor in his representative character as a kind of corporation sole may be helpful to English students, but we can hardly trust it to throw light on the actual formation of Roman legal ideas. For our English category of corporations sole is not only, as Maine calls it, a fiction, but modern, anomalous, and of no practical use. When a parson or other solely corporate office-holder dies, there is no one to act for the corporation until a successor is appointed, and, when appointed, that successor can do nothing which he could not do

without being called a corporation sole. In the case of the parson even the continuity of the freehold is not saved, and it is said to be in abeyance in the interval. As for the king, or 'the Crown,' being a corporation sole, the language of our books appears to be nothing but a clumsy and, after all, ineffective device to avoid openly personifying the State. The problems of federal politics in Canada and Australia threaten to make the fiction complex. Is 'the Crown' a trustee for Dominion and Province, for Commonwealth and State, with possibly conflicting interests? or is there one indivisible Crown being or having several persons for different purposes? (F. W. Maitland, L. Q. R. xvi. 335, xvii. 131; W. Harrison Moore, L. Q. R. xx. 351; Markby, Elements of Law, § 145)¹. The whole thing seems to have arisen from the technical difficulty of making grants to a parson and his successors after the practice of making them to God and the patron saint had been discontinued, as tending to bring the saints into the unseemly position of litigants before secular courts. All this, we may now think, makes for historical curiosity rather than philosophical edification.

But in any case the chief part of Maine's argument, his insistence on 'the theory of a man's posthumous existence in the person of his heir,' and the intimate connexion of that theory with the ancestor's representative character as head of the family, goes to the root of the matter. Mr. Justice Holmes, now of the Supreme Court of the United States, writing twenty years after Maine, summed this up with concise elegance (The Common Law, p. 343):—

'If the family was the owner of the property administered by a *paterfamilias*, its rights remained unaffected by the death of its temporary head. The family continued, although the head died. And when, probably by a gradual change, the *paterfamilias* came to be regarded as owner, instead of a simple manager of the family rights, the nature and continuity of those rights did not change with the title to them. The *familia* continued to the heirs as it was left by the ancestor. . . .

The aggregate of the ancestor's rights and duties, or, to use the technical phrase, the total *persona* sustained by him, was early separated from his natural personality. For this *persona* was but the aggregate of what had formerly been family rights and duties, and was originally sustained by any individual only as the family head. Hence it was said to be continued by the inheritance; and when the heir assumed it, he had his action in respect of injuries previously committed.'

Maine proceeds to trace the development of the Roman testament from a distribution of property, taking effect at once, made in

¹ See too *Williams v. Howarth* [1905] A. C. 551, noted p. 6 above.

contemplation of impending death or great peril, and requiring, in its earliest form, something like legislative sanction (cp. Girard, Manuel, pp. 792-5), through the intermediate stage of a conveyance reserving a life interest, which may be seen in the provincial customs of the Roman Empire, and much later in mediaeval and even modern systems. Muirhead (Historical Introduction to the Private Law of Rome, pp. 66, 168) pointed out a remedy for the difficulty suggested by Maine, that a will by mancipation must have left the testator penniless. Usufruct might very well be reserved on a mancipation, Gai. ii. 33, 'and a reservation of a life interest in one's own *familia* would possibly be construed even more liberally than an ordinary usufruct.' Still, usufruct is not among the earliest institutions, and it would be rash to say that the difficulty may not have been real at one time. But men have been driven all over the world, by an imperfect state of property law or by special reasons for avoiding publicity, to put very large trust in the honour of chosen friends and assistants; and there is nothing about the Roman *familiae emtor* in the most archaic stage to surprise an English student who has made acquaintance with our mediaeval feoffee to uses. Indian practice will furnish a parallel in the *benámi* (literally, 'anonymous') conveyances to a nominal purchaser, to hold on a secret trust for the real one, which appear to have survived the original reasons for them. Sohm, however, holds (Institutes, § 99, p. 569, in Ledlie's translation, 2nd ed.) that the testament *per aes et libram* was coupled with a mandate to the *familiae emtor*, which was binding under the well-known provision of the Twelve Tables, 'uti lingua nuncupassit ita ius esto.' This would of course simplify the matter. The same learned author's suggestion that the institution of an heir was a modified form of adoption—that is, an adoption deferred to the testator's death—does not seem to be generally accepted (Girard, Manuel, p. 793).

What is said in this chapter about Hindu law would no doubt have been fuller if a convenient and trustworthy textbook like Mr. Mayne's had existed at the time when it was written. I am not aware, however, that any modification is needed except on one point, namely that the strict determination of the order of succession among an ancestor's next of kin according to the spiritual efficacy of their sacrifices is found only in the school of Bengal, and is thought to be a deliberate Brahmanical innovation (see, however, as to probable Buddhist elements Mr. Justice Sarada Charan Mitra's papers in the L. Q. R. for Oct. 1905, p. 380, and in the present number). As Maine himself said in 1883, 'we now can discern something of the real relation which the sacerdotal Hindu law bears to the true

ancient law of the race' (Early Law and Custom, p. 194 ; see also the chapter on Ancestor-Worship and Inheritance). The general importance of keeping up the family ritual both in Hindu and in other archaic law remains undoubted. Some addition has to be made as regards the Hindu will. Quite unknown to early Hindu law, will-making came into use in modern times, though not in imitation of European practice according to the best authorities, and was not recognized in any of the Presidency Courts before 1832, when it was allowed in Bengal. When 'Ancient Law' was published the law was not yet quite settled in Madras and Bombay ; but the courts of those Presidencies followed the same course within a few years. Apparently the first form of the Bengal will was a gift *mortis causa* to religious uses. The reader will perceive the resemblance to the development of the testament of chattels, under ecclesiastical influence, in mediaeval English law. The English history, however, is for the most part too complex and peculiar to throw much light on the normal type of evolution. As for the Anglo-Saxon will, even if it can be assimilated to modern wills, which is doubtful, it was a special and anomalous kind of document, and disappeared after the Norman Conquest. Probably language is still to be found in popular books asserting or implying that before the Conquest there was general freedom of alienation ; but this is due to pure misunderstanding, the privileged class of transactions which are recorded in the Anglo-Saxon charters having been taken as typical and indigenous. Early English 'post obit gifts' (Pollock and Maitland, H. E. L. ii. 517 sqq., and see Note Q below) do present some analogy to the Roman will by mancipation ; and this appears in a strengthened form in the conveyance to feoffees to uses to be declared by the feoffee's will which was common in the later Middle Ages. In the thirteenth century divers learned clerks made an ingenious and, it seems, almost a successful attempt to create posthumous disposing power by grants *inter vivos*, containing in what we now call the 'habendum' such words as 'cuicunque dare vel etiam legare voluerit.' A clause so framed is quite common in deeds of the third and even fourth quarters of that century, and inconsistent utterances in Bracton show that learned opinion fluctuated (18b, 412b, *pro*, 49a, fuller and seemingly more deliberate, *contra*, cp. Pollock and Maitland, ii. 27). We may believe¹ that for some time and to some extent the power such clauses purported to confer was exercised without objection. But this was a transitory

¹ Extant wills of the period which purport to devise parcels of land (Madox, Form. Anglic. DCCXLVIII, DCCXLIX, DCCCLXXI) are not conclusive as to the practice in the absence of a known previous grant with which they can be connected, as other explanations are possible.

experiment, and has nothing to do with any real testamentary distribution or succession. Local customs to devise land or, at any rate, purchased land existed, but their origin and early history are still obscure.

In Scotland we find the most remarkable illustration of the prae-testamentary stage, as we may call it, of property law. Properly there is no such term as Will in Scots law, and there was no true will of lands before 1868. 'Heritage could only be transmitted by a deed containing words of *de praesenti* disposition, and the use of the word "dispone" was essential' (Green's Encycl. of the Law of Scotland, s.v. *Will*). The accustomed form was (and apparently still is, notwithstanding that it is no longer necessary) a 'trust disposition and settlement,' a present conveyance reserving a life interest to the grantor. Scotland, in fact, is the last home of the old Germanic *Vergabung von Todes wegen* (Goffin, *The Testamentary Executor*, 1901, pp. 19, 99). It may survive many generations yet, for aught we know, as in the customs of Egypt and other parts of the Roman Empire essentially similar forms continued in use long after true wills had become familiar in the law of Rome. Original examples of the second century A.D. found at Naucratis might be seen in London some years ago. Notwithstanding the marks of Roman influence which the modern English will bears, its practical scope and effect remain as different as possible from those of the Roman testament. As a rule the wills of Englishmen having any considerable property to dispose of aim not at investing any one person with the whole of the testator's control over his estate, subject to payment of debts and legacies, but rather at postponing absolute control and preserving the estate under the sanction of a trust which will not be finally determined while any child of the testator is a minor or his widow living. The capital is to be intact as long as possible, while the income is enjoyed or applied according to the testator's directions. If any one is at all like a Roman heir, it is the executor, who does not necessarily take any beneficial interest, and whose origin is quite different (Goffin, *op. cit.* p. 33; O. W. Holmes, *L. Q. R.* i. 165-6; Gierke, *Grundzüge des deutschen Privatrechts*, § 126, in *Encykl. d. Rechtswiss.* i. 555). The Roman horror of intestacy mentioned in the early part of the following chapter was equalled or surpassed among mediaeval Englishmen (Pollock and Maitland, ii. 356); but the reason was not one that would have occurred to any Roman from the time of Labeo to that of Justinian, being the danger to the intestate's soul if he died without having assigned a fitting part of his estate to pious uses (Du Cange, s.v. *intestatio*).

CHAPTER VII. Note N. *Primogeniture.*

Much has been written in recent years about the origins of mediaeval jurisdiction and land tenure, and the peculiar complication of tenure with personal lordship and jurisdiction which we call feudalism; we mention, almost at random, the names of Brunner, Waitz, Fustel de Coulanges, Flach, Luchaire; but there is nothing to throw doubt on the general soundness of the luminous sketch given in this chapter. Maine returns to the subject in the latter part of ch. viii. At the end of that chapter an opinion is adopted, it seems from Kemble, that 'some shade of servile debasement' attached to a Germanic king's or chieftain's personal companions. I have never been able to discover Kemble's authority for this supposition, or to meet with any other acceptance of it. See, *contra*, Konrad Maurer in *Kritische Überschau*, ii. 391.

Further observations on Primogeniture by Maine himself will be found in the *Early History of Institutions*, pp. 124, 198-205. We may add to the brief mention of 'parage' at p. 205 that the 'paragium' of the Norman customs has an important part in the Anglo-Norman nomenclature of Domesday Book. Groups of co-heirs holding 'in paragio,' and represented, for the purposes of the service due to their lord, by one of them who is sometimes called the senior, are common in several counties (Maitland, *Domesday Book and Beyond*, p. 145; Pollock and Maitland, *H. E. L.* ii. 263-4, 276; Pollock in *Eng. Hist. Rev.* 1896, xi. 228, note 65). This arrangement is a strong illustration of the practical convenience of primogeniture for the lord when feudal service was really military service. Maine's view that primogeniture originally had an official character seems to be thoroughly accepted; it would probably be found, if we had all the facts, that the occasional examples of primogeniture in servile or inferior tenures are to be explained by the tenement having been attached to some manorial or communal office. It would seem that, whether for reasons of convenience or because men like to imitate the fashion of their lords, the general introduction of primogeniture into England was to some extent a popular movement. In 1255 the burgesses of Leicester alleged that they were being ruined by partible tenures, and procured a charter from their lord, Simon de Montfort, which Henry III shortly afterwards confirmed, to change the course of descent to primogeniture (*Records of the Borough of Leicester*, ed. Bateson, Nos. xxiii, xxiv, the latter indorsed '*carta quod hereditas sit ad communem legem*'). On the whole subject Mr. Evelyn Cecil's book *Primogeniture: A Short History of its Development*

in various Countries, and its Practical Effects, Lond. 1895, may be studied with advantage.

CHAPTER VIII. Note O. *Capture, Occupation, Possession.*

The statements made in the early part of this chapter about the Roman doctrine of capture in war, its relation to the ordinary rules of *occupatio*, and the relation of both to the modern law of nations, are not easy to follow. Maine's general results do not depend on the accuracy of these statements, but it is necessary to indicate the points on which a reader unacquainted with Roman and international law might find the text misleading. First, there is really no authority for attributing to the Roman jurists the unqualified opinion that all spoil of war belonged to the individual captor, nor for deducing the rule of war from the law of *occupatio* in time of peace. Next, it is by no means clear that the Roman law of *occupatio* was more than one of many elements which went to form the modern rules as to belligerent rights. It is necessary to examine the authorities in some detail.

Maine seems to have relied on a passage of Gaius in the title of the Digest 'de acquirendo rerum dominio' (41. 1. 11. 5, § 7; 7, § 1; 1. 6 is clumsily interpolated by the compilers from another writer, and is not to our purpose). Gaius has spoken of the 'occupation' of *res nullius*, such as wild animals, and goes on to other classes of cases in which occupation or something like it confers ownership (and not merely possession) *iure gentium*. This last term would seem, in relation to hostile capture, to point to the actual usage of war rather than to the ideal law of nature, which at all events would not justify treating captives of free condition as slaves. 'Item quae ex hostibus capiuntur iure gentium statim capientium fiunt . . . adeo quidem ut et liberi homines in servitutem deducantur.' Then Paulus says, at the head of the next title, 'de acquirenda vel amittenda possessione': 'Item bello capta et insula in mari enata et gemmae lapilli margaritae in litoribus inventae eius fiunt, qui primus eorum possessionem nactus est.' Obviously no proof or authority was needed to show that a public enemy in arms could have no civil rights. The point is not that spoil of war ceases to belong to the enemy, but that capture, when it occurs, makes the captor an owner and not merely a possessor as between himself and his fellow-citizens. This does not tell us what is lawful spoil of war according to any specially Roman usage, nor does it exclude the restrictions of military discipline. Under the Empire, in fact, the commanding officer might distribute booty if he pleased, but plunder for the individual soldier's benefit

or any kind of subsequent private appropriation was distinctly forbidden. 'Is, qui praedam ab hostibus captam subripuit, lege peculatus tenetur et in quadruplum damnatur': Modestinus in D. 48. 13, *ad legem Iuliam peculatus*, 15 (ed. Mommsen, *vulg.* 13). Indeed, it may well be that the dicta of Gaius and Paulus contemplate only the case of enemy property found on Roman ground at the outbreak of a war: 'quae res hostiles *apud nos* sunt non publicae sed occupantium fiunt': Celsus, D. 41. 1. 51. Grotius comments on this dictum of Celsus, understanding it in this sense, and holds the right of private capture to be confined to acts not in the course of service, 'extra ministerium publicum': *De Iure Belli ac Pacis*, III. vi. xii, § 1; and so Girard, *Manuel*, p. 314. There is no doubt that land seized in war was acquired and distributed by the State: Pomponius in D. 49. 15, *de captivis*, 20, § 1. In considering these passages it is just as well to remember that problems arising out of a state of war between Rome and a civilized or wealthy enemy must have seemed a mere archaic curiosity to the jurists who flourished under the Antonines.

Then as to Grotius's use of the Roman law, he certainly quotes the words of Gaius already set out; but almost in the same breath he quotes the Old Testament, Plato, Xenophon, and Aristotle (op. cit. III. vi. ii, § 4). He denies (iv, § 1) that enemy's land can be acquired by mere invasion short of permanent occupation in force. He seems to think private plundering admissible in strict right, but elsewhere, under the head of *temperaments*—a kind of counsels of perfection to mitigate the rigour of war, most of which have since been adopted as rules—he suggests that captured property should be restored on the conclusion of peace, so far as practicable (III. xiii, 'temperamentum circa res captas'). Again, an early trait of Grotius, *De Iure Praedae*, published only in our own time (ed. Hamaker, Hag. Com. 1868), altogether repudiates the occupation theory of the right to spoil of war. He likens it to the right of judicial execution, and explains away the dictum of Gaius by holding that the captor takes only as the servant and in the name of the State; and he fortifies his doctrine, after the manner of the time, which he continues to follow in his own later work, with Hebrew, Homeric, and other Greek examples. It is difficult to find here much adoption of the Roman law of Occupancy. Perhaps other publicists of the seventeenth or eighteenth century may have been less discriminating than Grotius. If this is to be verified, it must be by some one more familiar with their writings than myself. No further light is thrown on the point in Maine's Cambridge lectures on international law, which he did not live to revise finally for publication. These questions, however, have long been anti-

quarian; modern practice has abrogated the old harsh customs of war, and the seizure of movables or other personal property in its bare form has, except in very few cases, become illegal (Hall, *Intern. Law*, 5th ed., p. 427: the whole chapter should be consulted).

Maine observes that the Roman law of Occupancy was altogether unequal to the task of settling disputes of title between different nations claiming new territories in right of their respective subjects who had discovered and more or less taken possession of them. Undoubtedly this is true, and it could not be otherwise. The difficulties have arisen in almost every case, down to the recent boundary question between Venezuela and British Guiana, from attempts to treat isolated, slight, and partial acts of dominion as equivalent to effective possession. Roman law knows nothing of any 'occupation' which does not amount to full and actual control. Hence the learning of occupation had to be supplemented by that of possession. Roman law, like the common law, recognizes the fact that a man cannot physically hold or control at the same time every square foot of a parcel of land, and therefore it allows legal possession to be acquired by entry on a part in the name of the whole and with intent to possess everything included in the boundaries. '*Quod autem diximus et corpore et animo adquirere nos debere possessionem, non utique ita accipiendum est, ut qui fundum possidere velit omnes glebas circumambulet: sed sufficit quamlibet partem eius fundi introire, dum mente et cogitatione hoc sit, uti totum fundum usque ad terminum velit possidere*' (Paulus in D. 41. 2, *de adq. vel amitt. poss.* 3, § 1). In order to apply this rule, however, we have to assume that the boundaries are known or ascertainable, and also that there is no effective opposition; and when the facts to which the application is to be made are those alleged to amount to a national occupation of unsettled territory, it is often far from easy to say whether these conditions are satisfied. In case of dispute whether possession has been established, we must resort to the rule of common sense, which is expressly adopted by the authorities of the Common Law, and does not contradict anything in the Roman law, namely that regard must be had to the kind of use and control of which the subject-matter is capable (authorities collected in Pollock and Wright on Possession, pp. 31-5). On the question what is the 'terminus' in the occupation of unsettled territory, certain conventional rules, which must be sought in the regular textbooks of international law, have been more or less generally adopted by the custom of nations, and in some cases express agreements have been made (Hall, *op. cit.* p. 114). The doctrine that occupancy produces ownership is of course not of the highest antiquity. Besides the reasons given by Maine, the

conception of individual ownership as a legal right, the *dominium* of Roman law, is itself relatively modern. How and why Roman law developed that conception as early as it did is a historical problem which, so far as I have learnt, we cannot solve with our materials. We only know that Roman property law, for whatever reason, was already quite individualist at the time of the Twelve Tables. I am not sure that I fully understand Maine's passing remark about the influence of natural law in this point. At all events the transformation of the Hindu Joint Family to its modern type can hardly be set down to any such influence, and, so far as it has gone, the example appears fairly parallel.

Blackstone's account of the origin of property is loose enough to deserve nearly all of Maine's criticism. He wholly fails to distinguish between physical control or 'detention,' possession in law, and ownership, and he talks as if our refined legal conceptions had come to *primaeval* man ready made, and in exactly the form and language of eighteenth-century publicists. But perhaps it was needless cruelty to suggest that Blackstone either did not understand the technical meaning of Occupation or intended to impose on his readers by playing with a verbal ambiguity. The word *occupare* is, after all, not purely technical in Latin; it certainly has no technical meaning in the passage of Cicero which Blackstone quotes (Comm. ii. 4; Cic. de Fin. iii. 20, § 67). Cicero was neither an original philosopher nor a great jurist; but no one would charge him with supposing that the right of a spectator in a theatre to the place he has taken ('*eum locum quem quisque occupavit*') had anything to do with the permanent acquisition of *dominium*. It would be more plausible to credit him with an inkling of the historical truth pointed out by Maine in these pages, that the notion of absolute legal ownership,—and still more the presumption that everything ought to have an owner, or that, as our own books say, 'the law must needs reduce the properties of all goods to some man,'—are rather modern than primitive. Blackstone's neglect to observe that the detached individual man whom he postulates is a kind of person altogether unknown to archaic institutions is the common and fatal fault, as Maine has in effect said, of all individualist theories of society: of Hobbes's, which Locke's was intended to refute, no less than of Blackstone's, which is a slight modification of Locke's.

Incidentally, but with provoking brevity, Maine speaks of Savigny's aphorism that property is founded on adverse possession ripened by prescription. This aphorism is certainly true for English law. Property in goods is, in the terms and process of the Common Law, not distinguishable from a right, present or

deferred, to possess them; and it is only under statutory provisions of very recent introduction and partial application that we know any means of proving title to English land other than showing continuous undisturbed possession, under a consistent claim of title, for a time long enough to exclude any reasonable fear of adverse claims. The conventional fixing of that time first by the usage of conveyancers and latterly by positive law makes no difference to the principle, nor do the elaborate rules which have been developed in various matters of detail. Title-deeds, as I have said elsewhere, are nothing but the written history of the possession and of the right in which it has been exercised. This is essentially a Germanic institution, as any one who pursues the subject will find; and when we consider the ideas of early Germanic law, we shall perhaps be less apt to find any problem in the fact of a possessor's rights being recognized by Roman law than to wonder how Roman law came so early by the full and clear conception of an owner's rights as distinct from possession. As to the historical origin of the Roman doctrine of possession there are now several theories in the field, and none of them can be said to be generally accepted, certainly not Savigny's, which was dominant when Maine wrote.

Note P. *The Indian Village Community.*

After Maine had acquired official knowledge of Indian affairs, he gave a hint in his lecture on 'Village Communities' that the local customs of India are neither so simple nor so uniform in type as an ordinary European reader of 'Ancient Law' might infer. 'I shall have hereafter to explain,' he said¹, 'that, though there are strong general resemblances between the Indian village communities wherever they are found in anything like completeness, they prove on close inspection to be not simple but composite bodies, including a number of classes with very various rights and claims.' The publication in more than one form (most conveniently in 'The Indian Village Community,' London, 1896) of B. H. Baden-Powell's authoritative researches on the Land Systems of British India has since made it common or at least easily accessible² knowledge that Indian villages are divisible into two principal and widely different types, of which the 'assemblage of co-proprietors,' formerly assumed to be the only normal one,

¹ I cannot find any fulfilment of this intention in Maine's published work. See the Preface to the first edition of 'Village Communities' for the probable explanation.

² Baden-Powell's work appears to have been wholly unknown to a learned gentleman resident at Madras, who published some notes on Ancient Law a few years ago.

is not the more ancient. Sir Alfred Lyall (L. Q. R. ix. 27) has approved Baden-Powell's 'conclusion that the oldest form of village was *not*, as is usually supposed, a group of cultivators having joint or communistic interests, but a disconnected set of families who severally owned their separate holdings.' There is a headman and there are village officers; we may say there is administrative unity for many purposes; but there is not communal ownership or tenure. There is no evidence that in villages of this kind, usually called *raiyatwāri*, and prevalent in Central and Southern India, the holdings were ever otherwise than separate and independent; 'the so-called joint village followed, and did not precede the village of separate holdings.' In the joint or 'landlord' villages of Oudh, the United (formerly North-West) Provinces, and the Panjāb, we find a dominant family or clan, oligarchs and in fact landlords as regards the inferior majority of inhabitants, and more or less democratic (for the shares are not always equal) among themselves. This type of village, which is in some ways curiously like a smaller reproduction of a Greek city-state, may be due to several causes. Conquest may produce it, or a deliberate new settlement, or joint inheritance among descendants of a single founder. In the case of conquest it may be superimposed on a former *raiyatwāri* village. Baden-Powell points out that all writers on the subject down to a time later than the publication not only of 'Ancient Law' but of 'Village Communities' had to generalize on incomplete materials,

'It can hardly be doubted that the information available when Sir H. S. Maine wrote was very far from being what it has since become. None of the reports on the Panjāb frontier tribal-villages were written—or at least were available in print; and the greater part of the best Settlement Reports of the North-West Provinces, Oudh and the Panjāb, are dated in years subsequent to the publication of Village Communities. Further, the Settlement Reports of the Central Provinces, the District Manuals of Southern India, and the Survey Reports and Gazetteers of the Bombay districts were many of them not written, and the others were hardly known beyond the confines of their presidencies. In this fact I find the explanation of the total omission in Sir H. S. Maine's pages of any specific mention of the *raiyatwāri* form of village, and the little notice he takes of the tribal or clan constitution of Indian races in general, and of the frontier tribal villages in the Panjāb' (The Indian Village Community, p. 4).

It will be quite a mistake, however, as we may learn at large from Baden-Powell, to assume that the family tenure or property which is the unit of the *raiyatwāri* village system is equivalent to individual ownership or any kind of ownership as understood in

modern Western law. What is certain is that there is no such thing as *the* village community of Hindu times, any more than there is any such thing as *the* village community of the Middle Ages in Europe. But there remains much profit to be derived from comparing the effects of more or less similar causes in fixing the customs of land tenure in the East and the West, whether those effects are, as they sometimes are, closely similar, or varied by the presence of other and different conditions. We no longer expect to find complete and parallel survivals of a common prehistoric stock of institutions, but it is not less interesting to find how easily parallel types may be developed at very distant times and places; and we are free to hold as a pious opinion that the Indian village council still known as the Five (*pañchāyat*)—though that has long ceased to be the usual number in practice, and the institution belongs only to the 'landlord' type of village—may go back to the same origin as our own reeve and four men, who flourish in Canada to this day. Robuster faith might be needed to find more than accident in the number of five hearths and five lawful men on Horace's estate ('*habitatum quinque foci et Quinque bonos solitum Variam dimittere patres*,' Ep. i. 14). A system of dividing land so as to give every man a share of every quality, which resembles our mediaeval common-field system even in minute detail, is described by Baden-Powell (op. cit., pp. 191, 414).

With regard to the supposed corporate or quasi-corporate ownership of European and especially English village communities, Professor Maitland's section thereon in *Domesday Book and Beyond*, pp. 340–56, gives a sound and much needed criticism of the loose language which was current among historical writers a generation ago.

Note Q. *Res Mancipi; Alienation in Early Law.*

Maine's opinion that the *res Mancipi* of ancient Roman law were 'the instruments of agricultural labour, the commodities of first consequence to a primitive people' is entirely confirmed by the best recent authors. Professor Girard, agreeing with Ihering, Sohm, and Cuq, considers the soundest explanation ('*la doctrine la moins aventureuse*') to be that the category consists of the necessary elements of the original Roman farmer's goods, to which alone, therefore, the early 'Roman forms of alienation' were applicable. It is further suggested that at first only *res Mancipi* were the subjects of full ownership, and that, at a time before individual property in land was alienable, the distinction *Mancipi—nec Mancipi* coincided with that of *familia* and *pecunia*, which had become obsolete at the date of the Twelve Tables (Girard, *Manuel*, p. 247). Muirhead's explanation (*Private Law of Rome*, p. 63) is similar,

adding that the things constituting the *familia* were those which determined a Roman citizen's political qualification after the Servian reforms. Alienation of such things might affect the owner's political standing, and was therefore of public importance; but I am not clear that this reason is not superfluous. Muirhead observes, deliberately not following Gaius, that the fundamental notion of *mancipium* is *manum*—not *manu*—*capere*, the acquirement of *manus* in the sense of legal dominion (op. cit., p. 61), which seems highly probable.

As to the fetters on alienation usually found in early systems of property law, Maine set it down as 'remarkable that the Anglo-Saxon customs seem to have been an exception' to the prevailing Germanic usage which forbade alienation of land without the consent of the family or at least the sons of the grantor. Maine's insight is now justified. The freedom which he thought anomalous, though it was accepted as a fact by the best authorities then accessible on Anglo-Saxon law, was really very partial indeed, being confined to land, or rather lordship over land, held by privileged persons and bodies under the privileged instruments known to contemporaries as 'books' and to us as charters. Only after the Norman Conquest did the charter become a 'common assurance.' As I tried not long ago to sum up in the simplest form practicable what is known and not known about customary land tenure before the Conquest, I may as well repeat my words:--

'We know next to nothing of the rules under which free men, whether of greater or lesser substance, held "folk-land," that is, estates governed by the old customary law. Probably there was not much buying and selling of such land. There is no reason to suppose that alienation was easier than in other archaic societies, and some local customs found surviving long after the Conquest point to the conclusion that often the consent of the village as well as of the family was a necessary condition of a sale. Indeed, it is not certain that folk-land, generally speaking, could be sold at all. There is equally no reason to think that ordinary free landholders could dispose of their land by will, or were in the habit of making wills for any purpose. Anglo-Saxon wills (or rather documents more like a modern will than a modern deed) exist, but they are the wills of great folk, such as were accustomed to witness the king's charters, had their own wills witnessed or confirmed by bishops and kings, and held charters of their own; and it is by no means clear that the lands dealt with in these wills were held as ordinary folk-land. In some cases it looks as if a special licence or consent had been required; we also hear of persistent attempts by the heirs to dispute even gifts to great churches' (The Expansion of the Common Law, pp. 156-7; L. Q. R. xiv. 304).

The analogy which Maine points out (p. 289) between the Roman *cessio in iure* and the Fines and Recoveries of mediaeval English law is of course genuine; but much earlier Germanic examples of a like device may be found, though not in England. *Auflassung* is the modern German term. Methods of this kind, when once ascertained to be efficient, are often used merely by way of abundant caution in spite of the additional trouble and expense involved. But in the classical real property law of the fifteenth century Fine and Recovery were already taking their places as regular specialized parts of a technical machinery.

CHAPTER IX. Note R. *Contract in Early Law.*

Remembering that Maine did not profess to write a treatise on Roman law, we shall not follow this brilliant and suggestive chapter with a critical eye for details. But we must note that Savigny's explanation of the Stipulation as an 'imperfect conveyance'—a truncated form of the *Nexum* (about which, by the way, little seems to be really known)—is not accepted by any recent author. The origin is now sought in an earlier religious obligation, probably by oath; opinions differ, as might be expected, as to the conjectural details (Muirhead, 22-7; Girard, 481, sqq.; Pacchioni, *Actio ex sponsu*, Bologna, 1888; Zocco-Rosa in *Annuario dello Istituto di storia di diritto Romano*, vol. 8, Catania, 1902). To such an origin the fact that the words *spondes? spondeo* could be used only by Roman citizens appears to point, though Savigny strangely failed to see this; and in mediaeval English law we actually find the religious sanction of the spiritual courts interposed, in the name of correcting the sinful breach of plighted faith (*fidei laesio*), to enforce promises which were still mere words for temporal courts, bound as they were to the archaic categories of forms of action. English example also shows how improbable it is that contract should be derived from an imperfect conveyance. In mediaeval English law a debt is constituted not by the debtor's promise to repay, but by a supposed grant of the sum to the creditor, and the creditor's action alleges no promise, but is in exactly the same form as an action to recover land, and is expressly called an action of property. Here we have conveyance enough. But the action of debt was quite incompetent to become the starting-point of any true law of contract, and when a way was found to sue on informal promises outside its limits, that way was altogether different. All this is in no degree prejudicial to the substance of Maine's argument, which is to show that the law of contract, or, to be exact, any comprehensive doctrine of con-

tract, appears everywhere only at an advanced stage of legal development. This is undoubtedly sound. Even the classical Roman law in its final form never attained a really general theory of contracts. Ultimately the want was supplied, but it would hardly be too much to say of the canonists on the Continent, certainly not too much to say of the common lawyers in England, that they took the kingdom of heaven by violence (cp. my Oxford Lectures, 1890, pp. 59-62; details and references for the English history in Pollock on Contract, 7th ed., pp. 136, 170; the use of the specially English term Consideration to represent the Roman *causa* is too dangerous a liberty to be allowed to any lesser man than Maine).

Maine censures unnamed English critics for identifying the quasi-contracts of the Civil Law (the term is, of course, not classical) with the implied contracts of the Common Law. But the truth is that this latter expression is, or very lately was, ambiguous. Real agreements manifested by acts and conduct, and not by words, were constantly spoken of as 'implied' contracts in English books, as Maine says, at the time when he wrote and long afterwards. Thus the Indian Contract Act of 1872 declares that a promise made otherwise than in words is said to be implied. Here a real agreement is inferred as a fact. But also many 'relations resembling those created by contract' (to use again the language of the Indian Act) arise from facts which in Roman law would produce an obligation *quasi ex contractu*. Such facts, under the Common Law, may produce an obligation ascribed in the old system of pleading to a fictitious promise, which promise was said to be 'implied' by the law. There are therefore so-called implied contracts in our law which may quite properly be compared with the quasi-contracts of the Roman law; they cover, indeed, much of the same ground. Of late years the term quasi-contract has been fully naturalized in the American law schools, and by this time it is fairly well known in England. 'Constructive contract' would have been correct and in harmony with the general usage of the Common Law, but no one seems ever to have used it.

One result, and a somewhat important one, of observing how late and slow of growth any general doctrine of contract has been in any system of civilized law is to strengthen the conviction that a huge anachronism is involved in those political theories which seek to make contract the foundation of all positive law and even of government itself. It should be noted that the doctrine of the Social Contract is much earlier than appears in Maine's statement, and that the theory of the divine right of kings, to which Maine alludes very briefly, was in its origin directed not against popular liberty but against papal and ecclesiastical claims to supremacy in

temporal as well as spiritual affairs, as Mr. J. Neville Figgis has shown at large in his learned and acute monograph (*The Theory of the Divine Right of Kings*, Cambridge, 1896).

We have said that the classical Roman system of contract was not theoretically complete; but this did not prevent the discovery that rights could be freely and largely modified by contract (for a discovery this was to the men of the Middle Ages, when the revived study of Roman law made the fact prominent) from exercising a fascination which is not at all exaggerated in Maine's remarks at the end of this chapter. For a time there was a tendency to assume that estates and interests in land could be modified without limit at the will of parties, and this was not effectually checked in England until the latter part of the thirteenth century.

CHAPTER X. Note S. *Archaic Procedure.*

The account given by Maine of the symbolism involved in the *Legis Actio Sacramenti* may be taken as generally correct. The *Sacramentum* itself, however, seems, according to the generally received modern opinion, to have had the definite and practical purpose of bringing the matter in dispute within the highest jurisdiction. Each party swears to the justice of his cause under a conventional forfeit, and thus the king, who is also chief priest, is brought in to decide which of them is perjured: 'il faut au roi, chef de la religion et de la justice criminelle, chercher qui a raison.' The separation of civil and spiritual jurisdiction under the Republic led to the abolition of the oath (Girard, *Manuel*, pp. 13, 977). If this opinion is right, the Praetor does not represent a discreet passer-by, nor yet (as might also be conjectured) the village elders, but intervenes as the minister of the king's justice, conceived in the first instance (as it was in England in the early Middle Ages) as an extraordinary justice applicable only for special reasons. English readers hardly need to be reminded of the fictions by which the King's Bench and Exchequer extended their jurisdiction to ordinary pleas between subjects.

Maine's reference to the trial scene described in the *Iliad*, *Σ.* 497-508, as adorning the shield of Achilles, is very brief; but the whole scene is of such interest for early legal history that we may be allowed to dwell on it a little. The point specially made by Maine is that the two talents of gold are a fee for the member of the court who shall be thought to speak the law best. On this he is confirmed by Dr. W. Leaf's very careful interpretation of the passage in his notes *ad loc.*, and his earlier paper in *Journ. Hell. Stud.* viii. 122. There is no difficulty about the magnitude of the

sum, for the Homeric talent represents only the value of one ox (Ridgeway in Journ. Hell. Stud. viii. 133). We shall now give Dr. Leaf's version.

'The people were gathered in the place of assembly, and there had sprung up a strife; two men were striving about the price of a man slain. The one averred that he had paid in full [namely by tender of the blood-fine then and there before the assembly; but Dr. Leaf's alternative in his later notes to the Iliad, Appendix I, "claimed to pay," is as good or better for the grammar of *εὔχερο πᾶν* ἀποδοῦναι, and makes better sense], and made declaration thereof to the people, but the other refused to accept aught [this is the proper idiomatic meaning of *ἀνάλυτο μηδὲν ἐλίσσθαι*: "denied that he had received anything" is, even apart from the context, barely admissible]; and both were desirous to take an issue at the hand of a daysman [this person, *ἱστῶρ*, summons the council and presides, but the judgment has to be theirs; he is more like the sheriff in the old county court than a modern judge or referee]; and the people were shouting for both, taking part for either side [not unlike such glimpses as Bracton's Note Book and other sources afford us of the behaviour of mediaeval county courts]. And the heralds were restraining the people, and the elders sate on polished stones in the holy circle [such stones may be seen on Dartmoor to this day], and in their hands they held the clear-voiced herald's staves. With these they rose up and gave sentence in turn; and in their midst lay two talents of gold to give to him among them that spake the justest doom.'

In addition to Dr. Leaf's reasons for rejecting the view formerly current that the dispute is on the mere question of fact whether a blood-fine admitted to be due has been paid or not, we may observe that such a payment would surely be made in a notorious manner and with ample witness, to say nothing of the physical difficulty of handing over some score of cattle (for such would be the most likely form of payment) as privately as modern debtors hand over cash or post a cheque.

The result is that we are confronted with an ancient Greek blood-feud in an interesting stage of transition, that in which the slain man's kindred are no longer free to accept or refuse compensation at their will, but are expected to abandon the feud, in a proper case, on receiving a sum fixed either by custom or by the judgment of the assembly. Homicide aggravated by treachery or the like would probably not fall within such a rule; and the amount of the fine, if we may judge by the practice of Iceland as described in the Sagas, might give matter enough for discussion among the wise men even if no preliminary question arose. Indications of a similar stage, though not clear enough to amount to proof if they stood alone, may be found in the Anglo-Saxon laws.

There is no question in the Homeric text of a formally compulsory jurisdiction; the parties have agreed to put themselves on the judgment of the assembly whether in all the circumstances, whatever they were, tender of the customary fine ought to be accepted. But when such voluntary references have become common practice we are near the point at which they cease to be voluntary, and the party who stands out for what formerly would have been his right incurs, at all events, public reprobation which will be an efficient sanction for most purposes.

Maine's opinion that in the infancy of criminal jurisdiction the sum paid to the king, or the State, was not penal, but a fee for hearing and determining the cause at the request of the parties, 'the fair price of its time and trouble,' is borne out by later researches in the antiquities of Germanic law. Such was probably at one time the *wite* of the Anglo-Saxon laws, though it is treated as penal in the earliest documents we have. If one feature in early procedure may be fixed on more than another as marking the recognition of criminal and civil responsibility as distinct in character, though one and the same act may be and quite commonly is both a wrong and an offence, perhaps it is the appearance of a special fine for breaking the peace. The development of the king's peace in England from a privilege attached to certain persons, places, and occasions, to the common right of every lawful man belongs to another and later stage.

FREDERICK POLLOCK.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Treatise on Private International Law: with principal reference to its Practice in England. Fourth Edition. By JOHN WESTLAKE, K.C., assisted by ALFRED FRANK TOPHAM. London: Sweet & Maxwell, Lim. 1905. La. 8vo. xxx and 437 pp. (16s.)

THE last edition of this work was published fifteen years ago. In the course of so long a period a number of matters of Private International Law have to some extent undergone modification. Thus, as Professor Westlake points out, '*De Nicols v. Curlier* has settled that the proprietary relations of husband and wife are unaffected by a change of domicile after their marriage; *Le Mesurier v. Le Mesurier* has established that a residence not amounting to domicile cannot found the jurisdiction for divorce; *Winans v. Att.-Gen.* has dispelled the uncertainty which certain cases, culminating in *Moorhouse v. Lord*, had thrown over the *animus* necessary for acquiring a domicile of choice,' &c. These modifications and others of minor importance, and additions of a corroborative rather than a modificative character, have increased the dimensions of the book from 382 pages, composing the third edition in 1890, to 437 pages in the present volume.

Professor Westlake discusses in particular the new doctrine known to the scientific lawyer under the name of *Renvoi*. He explains that what are called the *international laws* of a country, though distinguished from the rules of private international law adopted in it, form with the latter the whole law of a country. For example, twenty-one as the English or Danish age of majority and nineteen as the Italian, 'carefully separated from all consideration of an enacting authority having a definite range of legitimate action,' are treated as being the international laws of the respective countries, and their whole laws on the subject are made up by adding the principle of domicile or nationality as the case may be. 'Then on one view, which is called in French *renvoi* and in German "Rückverweisung," the rules of private international law are understood as referring a judge to the whole law of a given country, and not merely to its internal laws, so that in the case put above the principle of domicile would be understood as referring an English or Danish judge, who might be seized of the case, to the whole law of Italy, as determining the majority of the *de cuius*; this reference being made, the principle of nationality included in the whole law of Italy, would refer the same judge back to the whole law of his own country; that whole law would send him again to Italy; and so on for ever. No result is arrived at: there is a *circulus inextricabilis*.' The opponents of the *renvoi* treat the theoretical possibility of the *circulus inextricabilis* as proof that the rules of private international

law never refer a judge to the whole law of another country, but only to its internal laws. Professor Westlake discusses the two alternatives with his usual acumen. Article 27 of the new German Civil Code seems to apply the doctrine when it says, 'If by the law (*Recht*) of a foreign State, of which the laws (*Gesetze*) are declared' by different articles which it mentions, to be applicable, 'the laws (*Gesetze*) of Germany are to be applied, the latter shall be applied'; that is to say that the *renvoi* is admitted without any reference back. It is obvious that the doctrine arises out of the fact that some countries apply the law of the domicile in cases where others apply the law of nationality. This is not the place to discuss the question, but it occurs to us that where the law of a country prescribes that the national law of a foreigner shall apply, such a law can only mean that the law which attaches to his person, as the subject of the foreign State, and not merely a rule for the determination of conflicts of law, is applicable, and we take this also to be the view of our learned friend, the author, though the conclusion he sets out at the close of Chapter II (p. 40) does not appear to us to perfectly clear up the point.

Professor Westlake's book is too well known among the indispensable books on Private International Law to require any further commendation, and a new edition bringing all the matters of which he treats in it down to date can only be welcome.

T. B.

La Constitution juridique de l'empire colonial britannique. PAR H. SPEYER.
Paris: Arthur Rousseau. 1906. 8vo. viii and 337 pp. (6 fr.)

BOTH in France and in Belgium there has been great advance of late years in the accurate study of foreign institutions, and the present work of a learned Belgian is a good example. So far as the author has a thesis, it is that the leading factor in the development of the British Empire has been the character of its political institutions.

He describes the various types of government which are to be found under the British flag, from the complete dependency of a merely military station like Gibraltar to the complete autonomy of New Zealand or Canada. So far as we can judge without a very minute examination, his statements are founded on careful study of the best and most recent sources of information, and may be relied on throughout. To take a small point about which the present writer happens to know something, the practical supersession of Spanish law by the Common Law in Trinidad, on which it would be very easy to go wrong, is reported with absolute correctness. For a test of the work being up to date, the erection of Alberta and Saskatchewan (not Askatchewan as printed) into Provinces of the Dominion of Canada is duly recorded. From one unguarded sentence an uninformed reader might infer, but M. Speyer does not say, and we do not suppose him to believe, that the Supreme Court at Ottawa not only has authority to interpret the Confederation Act, but exists only for that purpose. The account of the Australian Commonwealth Act, anything but an easy subject, is remarkably clear. We doubt whether any Continental author before M. Speyer has explained so well, or at all, the singular juxtaposition in British India of Asiatic and European personal and territorial law.

The last chapter, entitled 'La Fédération impériale,' is to some extent in the nature of prophetic conjecture. We conceive that M. Speyer is a free-trader; at any rate he sums up the objections to Mr. Chamberlain's fiscal policy with great force. As to future constitutional development, we

think he greatly exaggerates the difficulties of getting the existing Colonial Conferences, with or without a change of name, to do the work of a real Council of the Empire; and the alternative which he suggests of enlarging the number and functions of the Imperial Defence Committee is open to much graver objections on both imperial and colonial grounds. But one is agreeably surprised to find that a Continental student of our political system appreciates the importance of the Defence Committee so far as even to expect too much of it.

F. P.

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH. Eleventh Edition. By EDWARD LOUIS DE HART and RALPH ILIFF SIMFY. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1905. La. 8vo. Two volumes. lxxxiii and 1484 pp. (£2 2s.)

THE last edition of this well-known work was published in 1890. The editors of the present edition have re-arranged and partly re-written the chapters on the sale of goods and on partnership and on the contract of affreightment; they have also added a summary statement of the rules of patent law to the chapter hitherto dealing exclusively with goodwill and trade marks. They have not, however, succeeded in removing the principal faults pointed out in our notice of the last edition (L. Q. R., vol. vi. pp. 333-7), namely: 'absence of arrangement, inaccuracy of statement and failure to revise judiciously both the law and the practice therein stated with regard to the changed conditions of commerce.'

A legal textbook and more particularly a textbook on mercantile law which has lived for more than seventy years must of necessity suffer from senile decay. The editors, however able and industrious they may be, cannot do themselves justice while the fear of laying impious hands on a venerable arrangement and a venerable text hampers all their efforts. In the case of the book now before us, this fear seems to have gone even beyond the ordinary limits. The faults of arrangement have already been sufficiently dealt with in our notice of the last edition, but some of the instances in which the retention of the old text has had a particularly unfortunate effect may be given, so as to illustrate our meaning.

On p. 485 it is stated with reference to the fiction discarded in *Aubert v. Gray* (1862) 32 L. J. Q. B. 50, which at one time impaired the validity of an insurance effected by a foreigner against the acts of his own Government, that: 'this fiction has been disregarded, and a foreigner, in a time of peace, may effectually protect himself by such an insurance.' What possible good can it do to a modern reader to be informed about a fiction, which in fact was not merely disregarded but utterly extirpated by the Court of Exchequer Chamber in 1862, and which already at that time was considered unwarranted by the most authoritative textbook writers?

On p. 581 the text states, as regards contracts of 'hiring and service,' that: 'if there be no special agreement or no usage or custom, but the hiring is a general one without mention of time, it is considered to be for a year certain,' and (on p. 583) the author proceeds as follows: 'it was thought to follow from what is above stated, that if a master dismissed his servant (hired generally) without cause, the latter would have a right of wages up to the expiration of the year. This notion however has proved to be erroneous.' The case quoted as having proved the notion to be erroneous was decided in 1828. What possible object could there be for retaining either passage? The first gives an incorrect statement of the

law; the second refers to an incorrect inference drawn from it, and recognized as incorrect by a judicial authority nearly eighty years ago.

On p. 66o the following statement begins the section on the form and requisites of a contract of sale: 'A sale of goods may either be by deed or parol. A sale by deed is not at present usual. When such a deed (which is denominated a bill of sale) is executed, the property in the goods conveyed by it passes out of the vendor into the vendee by its delivery.' This suggests (1) that a bill of sale must necessarily be under seal; (2) that the property in goods cannot be transferred by a contract of sale made by parol. The editors are of course aware of the fact that this is incorrect, but why did they retain such an archaic and incorrect passage by the side of the plain language of s. 3 of the Sale of Goods Act which is transcribed on the next page?

The section on the nature of joint stock companies begins with the following passage (on p. 72): 'A joint stock company [established before the enactments presently mentioned and which has not adopted their provisions] is a partnership consisting of a large number of members, whose rights and liabilities would be precisely the same as those of any other sort of partners, had not their multitude obliged them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument called the deed of settlement.' Here a type is selected as the starting-point for the explanation of the nature of joint stock companies, which if not entirely extinct, is dead for all practical purposes. This is sufficiently misleading, but the reader's confusion is increased by the passage (on p. 76) headed 'how formed and regulated,' which runs as follows: 'A joint stock Company established before the 1st November 1844 . . . was usually formed by deed of settlement, as it is called, sometimes accompanied by a private Act of Parliament or a royal patent.' The statement (on p. 72) clearly refers to unincorporated companies, but the passage (on p. 76) which the reader must take to refer to the same class of companies, seems to draw no distinction between them and corporate bodies constituted by Act of Parliament or by Royal Charter; if this is not intended, the words 'accompanied by a private Act of Parliament or a royal patent' are quite unintelligible.

Many more examples could be added to those already given, illustrating the vice of the practice of continuing to bring out new editions of books on mercantile law written at a time since which the general conditions of life and the machinery of trade and commerce have been fundamentally changed and transformed in every direction.

There can be no two opinions on the unsatisfactory results of a method which aims at describing the present state of mercantile law by means of a series of postscripts to statements giving an account of the law as it existed at the time of William IV, and the principal faults of the present edition are due to the adoption of this method. The editors might however have exercised a little more diligence in the revision of inaccurate and misleading passages. In addition to those already referred to we give a few more examples, taken from the chapters on negotiable instruments and bills of exchange, but many others could be added from these as well as from other parts of the book.

On p. 245, sect. 55 of the Bills of Exchange Act, 1882 (which defines the engagements as to acceptance and payment undertaken by the drawer of a bill of exchange) is transcribed *in extenso* and then the text proceeds as follows: 'If the drawee refuse to accept, the contract is broken and the Statute of Limitations begins to run in his favour from that period . . .

Time runs in favour of an indorser or drawer from the time when he becomes liable to an action at the suit of the holder, that is, in general, when notice of non-acceptance or non-payment is given.' According to the natural interpretation of words this seems to mean that the statute runs in favour of the drawee from the time of non-acceptance, and in favour of the drawer or of an indorser from the time of the receipt of the notice of non-acceptance or non-payment, but it is hardly possible that the editors should have intended to convey such an absurd statement; for the liability referred to in s. 55 (1) is exclusively the drawer's liability; the drawee by not accepting a bill incurs no liability arising on the bill of exchange, and there can be no question affecting him as to the computation of the period of limitation. The first sentence, therefore, as well as the second must refer to the drawer's liability arising on the non-acceptance of the bill—the two sentences, however, do not agree as to the date from which the statute runs, and neither of them contains an accurate statement on the subject.

On p. 239 we read: 'an instrument is, properly speaking, negotiable when the legal right to the property secured by it is transferable from one man to another by its delivery. Of this description are bills of exchange and promissory notes payable to bearer or indorsed in blank.' Does this mean that bills of exchange or promissory notes drawn to order and not indorsed in blank are not negotiable instruments?

On p. 242 it is stated that 'a cheque may be rendered not negotiable by crossing.' If this means that an ordinary special or general crossing deprives a cheque of its negotiable character, the assertion is of course incorrect; if it alludes to the effect of the insertion of the words 'not negotiable,' a previously uninformed reader will hardly discover the meaning.

On p. 278 the following passage occurs: 'A bill or note, though generally speaking negotiable, after it has become due, is nevertheless discharged by payment in due course by or on behalf of the drawee or acceptor, or, in the case of an accommodation bill, by the party accommodated.' We have vainly tried to decipher the meaning of this sentence, but whatever its meaning may be, it is clearly incorrect to say that an overdue bill is negotiable (see Bills of Exchange Act, 1882, s. 36 (2)).

A general book on mercantile law, as pointed out in our notice of the last edition, is not wanted by legal practitioners, who will naturally prefer to make use of the excellent textbooks which are in existence on every one of the subjects usually dealt with in such a work, but for students and even for men of business a well-arranged and accurate survey of the general principles of law affecting the several kinds of transactions usually occurring in mercantile business, and explaining the constitution of mercantile partnerships and companies and other trading associations would be extremely useful; such a book must primarily give an account of the present state of things, referring to extinct institutions and repealed or obsolete law only in so far as this is necessary to explain the existing rules, and above all it must be written in intelligible language and be free from mistakes similar to those which we have pointed out.

We do not of course object to historical statements as to the growth of the law, and we therefore appreciate the fact that the editors have retained Sir John Macdonell's excellent introduction as to the origins of the Law Merchant, but the law of to-day should be described in the language of to-day.

E. S.

International Civil and Commercial Law as founded upon Theory, Legislation, and Practice. By F. MEILI, Professor of International Private Law in the University of Zürich, &c. Translated and supplemented with additions of American and English law. By ARTHUR K. KUHN. New York: The Macmillan Company; London: Macmillan & Co., Lim. 1905. 8vo. xxvii and 559 pp.

MR. KUHN deserves the thanks of English and American readers for his painstaking translation of Professor Meili's well-known treatise on private international law, which constitutes the first and—so far—the only attempt to give a comparative exposition of the varying theories and legal rules which respectively exist in European and other countries with reference to the conflict of laws. A judicious comparison of these rules is in itself a help to their intelligent interpretation, and a guide to the solution of many practical difficulties arising from the application of any particular system. Professor Meili's work contains most valuable material for such a comparison, but his own critical observations, though frequently valuable and suggestive, show a lack of unity and system which detracts from their usefulness. The author has hampered himself by comparing too many systems and too many opinions; a selection of the principal types would have facilitated his task as well as that of the reader.

To an English or to an American reader the comparison between his law and continental law is, of course, of special interest; and in view of this fact the translator has made considerable additions to the text, but, as the text itself also contains allusions to English and American law, this leads sometimes to repetition and at other times to contradiction. Thus there are two entirely contradictory assertions as to the English view on the rules upon which the validity of a marriage depends (comp. p. 220 with p. 224).

On some matters as to which the author and the translator are in agreement in their view of English law, they express opinions opposed to those of the recognized authorities. Thus the translator's assertion on p. 188 that 'it is uniformly held in both countries (viz. England and the United States) that the question of majority is one of national policy and therefore the *lex loci actus* . . . will govern,' which corroborates Professor Meili's opinion expressed on p. 186, is clearly incorrect. The subject is one in which no uniformity of opinion has so far been attained (see Lord Macnaghten's dictum in *Cooper v. Cooper* (1888) 13 App. Cas. 88, 108), but there is no doubt whatever that, as to certain classes of transactions, the disabilities imposed by the law of his domicile upon a person deemed to be an infant according to that law are recognized by English Courts, irrespectively of the question whether, according to the *lex loci contractus*, such person would be deemed an infant or not (see Dicey, *Conflict of Laws*, pp. 543-8; Westlake, *Private Int. Law*, 4th ed., pp. 41-4).

The author, when stating (on p. 160) that the status of a *prodigus* is not recognized in American or English law, is no doubt in agreement with some textbook writers of great authority, but the only decided cases on the subject (*Worms v. de Valder* (1880) 49 L. J. Ch. 261, and *re Solot's Trust* [1902] 1 Ch. 488) deal with persons placed under a 'conseil judiciaire' under French law, and rest mainly on the ground that the appointment of a 'conseil judiciaire' does not effect a change of status. It would therefore still be open to an English Court of first instance to recognize the disabilities imposed on a *prodigus* by the law of his domicile,

if it were shown that according to that law the imposition of such disabilities did in effect create a change of status, and that such status was not of a penal character. Moreover Prof. Westlake's powerful criticism of the cases referred to above (Priv. Int. Law, p. 50) may not improbably induce a higher Court to reconsider the same on the next opportunity. In any event Professor Meili's assertion, which ascribes the non-recognition of the status of prodigality to 'feudal doctrine,' is not borne out by the facts.

It is much to be regretted that the translator has not brought the English authorities up to date, and that many recent decisions and their results are completely ignored: among the most important cases which are passed over in silence the following are specially noticeable: *Hamlyn v. Talisker Distillery* [1894] A. C. 204; *De Nicols v. Curlier* (No. 1) [1900] A. C. 21; *S. C.* (No. 2) [1900] 2 Ch. 410; *Didisheim v. London & Westminster Bank* [1900] 2 Ch. 15; *Viditz v. O'Hagan* [1900] 2 Ch. 87; *Carr v. Fracis* [1902] A. C. 176; *Husey-Hunt v. Bozzelli* [1902] 1 Ch. 751; *re Selot's Trust* [1902] 1 Ch. 488; *Janson v. Driefontein Consolidated Mines* [1902] A. C. 484; *re Johnson* [1903] 1 Ch. 821; *Pouey v. Hordern* [1900] 1 Ch. 492; *re D'Este's Settlement Trusts* [1903] 1 Ch. 898; *Embericos v. Anglo-Austrian Bank* [1904] 2 K. B. 870; *re Fitzgerald* [1904], 1 Ch. 573; *Winans v. At.-General* [1904] A. C. 287; *Risdon Iron Works v. Furness* [1905] 1 K. B. 304. In several places authorities are referred to as supporting propositions with which they are entirely unconnected. (See for instance the references to *Jacobs v. Crédit Lyonnais*, 12 Q. B. D. 589, on p. 356 and the reference to *Atkinson v. Anderson*, 21 Ch. D. 100, on p. 190.)

It is very much to be hoped that, whenever a second edition of the English translation of Prof. Meili's work is published, the comparisons with English and American law may be thoroughly revised. As it is, the book, notwithstanding its many defects, will be a valuable assistance to the comparative study of the rules as to conflict of laws. The reproduction and translation of the Hague Conventions as to Marriage, Divorce and the guardianship of infants form a useful appendix, and the alphabetical index is conveniently arranged.

E. S.

The Principles of Mahomedan Law. By DINSHAH FARDUNJI MULLA. Bombay: Thacker & Co. 1905. 8vo. xiii and 195 pp. (Rs. 3.)

THIS is a work by Mr. Mulla, a distinguished Bombay lawyer, and, as far as I am able to judge, it is an accurate statement of the Mahomedan law as applied in India. The law is set out in a series of succinct propositions with illustrations which contain the authorities for the proposition which they illustrate, and sometimes a good deal more in the way of comment.

That the book will be useful to many persons desirous to ascertain the Mahomedan law I have no doubt. The doubt that has occurred to me is whether the form chosen by Mr. Mulla, which is that of a Digest, is one which is altogether the most suitable for students. No doubt Mr. Mulla, as a Professor of Law in India, knows the capacity and the wants of Indian students, but for an English student I should prefer, at any rate as a first step, a statement of the generally admitted principles of Mahomedan Law in matters to which they are applicable, with a very sparing reference to cases, which are, I think, apt to confuse a student, and with a fuller reference to the relation in which they stand to analogous institutions in other systems.

I notice that Mr. Mulla has not altogether avoided what I venture to call the objectionable practice of Indian lawyers using highly technical terms of English law in a non-technical sense, as, for example, using the term 'seisin' to express simple possession of either movable or immovable property, which has not been admissible here for some centuries. I am aware that there are some cases in which it is very difficult to avoid doing this: as when we speak of the estate of a Mitakshara family in the Hindu law as a joint estate: but this can only be justified by absolute necessity. A case in which there is certainly some danger in an incorrect use of English technical terms is when, as I have not unfrequently noticed, Indian lawyers speak of the estate of a Hindu widow as a life estate.

W. M.

A Digest of English Civil Law. By EDWARD JENKS (editor), W. M. GELDART, W. S. HOLDSWORTH, R. W. LEE, J. C. MILES. Book I. General, by EDWARD JENKS. London: Butterworth & Co. 1905. xxvii and 101 pp. (5s. net per part.)

THIS attempt to digest the principles of English private law into a series of rules, which while comparatively few in number, shall be so clear as to be intelligible even to laymen deserves high praise. The endeavour is remarkable for its boldness. The legal literature of England has many merits, but it is singularly deficient in orderly statements of broad principles. Caution and precision are the characteristics of our most authoritative writers. Their legal textbooks contain so much about the limitations and exceptions to every rule, that students come to think that the law is made up of exceptions and anomalies, and fail to perceive the existence of those fundamental principles in the light of which alone anomalies themselves can be intelligibly explained or rightly understood. Any one then interested in legal study must feel sincere gratitude for the boldness with which at the risk, or rather the certainty of making occasional mistakes, the present authors have tried to bring to the knowledge of every intelligent reader the principles, in the main most rational, which lie at the foundation of the modern law of England. To this must be added that a critic who judges the capacity of our authors from the first instalment of their work, may entertain reasonable hopes that in the performance of the difficult task they have set before themselves they will attain a fair measure of success. From the eighty-four pages of Book I of this new Digest a student may gain more knowledge of the general principles of English law than he could acquire from a perusal of many heavy volumes.

While, however, any one who has ever tried to reduce even a limited portion of English law to a systematic body of clear rules, must feel genuine admiration for the skill with which our new codifiers, as represented by Mr. Jenks, have carried out a bold and well-conceived design, he is bound to note that they display, as do all men, some of the weaknesses which are the natural accompaniments of their merits. It is extremely difficult for even the most learned of lawyers and the most skilful of draftsmen to state the law of England at once with clearness, brevity and precision; it is not every day that one comes across a writer such as was the late Mr. Leake, who from a rare natural gift, which had been improved to the utmost by the severe training of a special pleader, could make statements of law, which to lawyers, at any rate, were perfectly intelligible, but at the same time never went an inch beyond the authorities on which these statements rested. But this combination of clearness and precision is the

rarest of endowments. The authors of our Digest write clearly and express their meaning with terseness: but their work occasionally shows a lack of precision. Take sections 8 and 9, for example, which treat of the domicile of a minor; they convey to a reader information which is generally correct about a thorny topic, but any one, who has tried to work that topic out, knows that it involves more of doubt and difficulty than would be apparent to a reader of the Digest. Thus it is true that generally speaking 'the domicile of an illegitimate minor is that of his mother, if living.' But no lawyer will confidently assert that if the mother being an English-woman marries in England a Russian (not the father of her child) who though resident in London, is domiciled in Russia, and thus herself becomes domiciled in Russia, her child born before her marriage at once acquires a Russian domicile.

Section 77 again states that 'if a person uses means of declaration which, in the circumstances, would reasonably be taken to indicate a particular intention, he cannot be allowed to deny the existence of such intention as against any party who has, in good faith, acted upon it.'

This statement no doubt is meant to be read together with sect. 80 which informs us that: 'A declaration of intention not meant to produce legal consequences, cannot be enforced by any person who, when he acted upon it, was aware of its real character.' But these sections even when blended, are open to criticism. They tend to revive the fallacious idea, at one time entertained by judges of eminence, but completely exploded at this day, that a representation which is not operative as part of a contract or by way of estoppel or as an actionable wrong, may still be binding on the person making it.

Turn to sect. 87 where we are told that 'a bona fide mistake of fact, made without negligence, by one party to a transaction, as to the . . . identity of the other party . . . renders the transaction void.' A statement of this kind may undoubtedly be found in books of authority, it is supposed to be supported by such a case as *Boulton v. Jones* (1857) 2 H. & N. 564, but it is nevertheless in our judgment erroneous. *X* goes into a shop and orders goods of the tradesman whom he believes to be *B*. As a matter of fact the tradesman is *A*. *A* does not know of *X*'s mistake, or if he does know of it, has not the least reason to suppose that *X* is ordering the goods because the seller is *B*. He thinks, as every shopkeeper has *prima facie* a right to think, that the customer orders the goods from him as the keeper of a particular shop without caring for a moment whether his name be Jones, Brown, or Robinson. We assert with some confidence that, in the circumstances supposed, though *X* has made a bona fide mistake as to the identity of *A* the transaction is not void, and *A*, the goods having been ordered, has a right to deliver the goods and to sue *X* for refusing to accept them, or if he has accepted for declining to pay for them. *Boulton v. Jones*, when properly considered, is absolutely consistent with our contention. That case does nothing more than illustrate the elementary principle, that an offer can be accepted only by a person to whom it is made. The fact that *X* writes an order for goods to *B* does not entitle *A*, who knows that the offer has been made to *B*, to supply *X* with the goods, and sue him for the price.

The statement, lastly, in a note on article 138, that the doctrine of 'common employment' is probably a survival from the days of gild contracts and statute labour, appears to us to be an excess of historic zeal. Not only the doctrine of 'common employment,' but the rule of *respondet superior*, from which it is an exception, is believed to be of modern origin;

and it is most unlikely that either the Court of Exchequer or Chief Justice Shaw of Massachusetts, who between them started the doctrine, about two generations ago, knew or cared anything about the trade customs of the Middle Ages.

Let our criticism, however, not be misunderstood. The compilers of this new Digest are well up to their work. The severest charge which can with fairness be brought against them, is that in the attempt to perform a most difficult feat of draftsmanaship, they have sometimes shown a lack of complete accuracy of expression. But the existence of blemishes, which can easily be corrected and with care avoided, must not conceal from any one the great merit of this Digest of English Civil Law. In England it is almost always the case that the efforts of individuals, and in modern times of individuals acting in combination, must carry out works which in other countries are taken in hand by Government. If English law is ever to be codified it is quite certain that individual lawyers or bodies of lawyers must do much to codify it, before any Government attempts to give us a Code. This new Digest does attempt to express in an intelligible form the main principles of a large department of the law of England. From the nature of things the object of its authors cannot be at once attained, but they have made a long step in the right direction. The part of the Digest already published will be of untold value to two classes of persons. It will benefit students who wish to obtain a clear outline of the law; it will be even more valuable to teachers who wish to master English law scientifically. Even statements which admit of controversy are of great use. Any one of the 175 sections in this first Book of the Digest stimulates thought. In most cases the reader is made to see clearly some principles which he before had only vaguely grasped; even when he doubts, he is driven to think. We may be wrong, or our author may be wrong, as to the exact effect (for example) of mistake; but in any case a bold statement of the law challenges discussion, and rational discussion is the best means for attainment of truth.

The American Judiciary. By SIMEON E. BALDWIN. New York: The Century Co. 1905. 8vo. xiii and 403 pp.

THIS book will be indispensable to every one who desires a comprehensive and accurate general view of the judicial practice of the Common Law as it exists in the United States. We shall not attempt a specific account of the contents, but only mention a few of the interesting points touched on by Judge Baldwin. He tells us of the New England preference of Mosaic to English law, which lasted almost till the War of Independence in his own State of Connecticut; and of the amateur paternal justice dispensed by justices of the peace in Virginia down to recent times, of which we have had first-hand confirmation from a learned Virginian friend. Counsel coming from a distance to conduct a case have been told by one of these rustic patriarchs that the Court had already decided the case, but would be pleased to hear their arguments. In the main the causes were simple and the judgments gave satisfaction. It will be curious news to some of our readers that the War Department of the United States has found it necessary to set up a kind of administrative jurisdiction in the Philippines.

Some particulars are given of the variations in judicial costume. 'The members of the Supreme Court and of the Circuit Court of Appeals of the United States have always worn black silk gowns. The members of

the Supreme Court of South Carolina have worn them from a time antedating the Revolution. The New York Court of Appeals in 1877, at the request of the Bar, preferred through David Dudley Field, adopted the practice, and the same thing has since been done by appellate courts in several other States.' At Ottawa the Supreme Court of the Dominion has adopted the winter habit of English Common Law judges, black and ermine, though some members of the Bench and Bar, as we have heard, think the simplicity of the Supreme Court at Washington better suited to that side of the Atlantic. Anatole France, who knows England very well, has prophesied that our judges will still be wearing their wigs after England has become a Socialist commonwealth. As to the tenure of judicial office in American States, Judge Baldwin reports of it that popular election (which is the rule, though not without illustrious exceptions) is practically under the control of the Bar to a great extent, and therefore works better than might be expected: but 'the general sentiment of thinking men in the United States is that judges should never be chosen by popular vote.' Canada has escaped this false application of democracy, for which Jefferson seems to have been answerable.

We learn with mixed feelings that more than fifty sets of federal and State reports produce about four hundred volumes of reports a year. The English Law Reports make six, or seven including the Indian Appeals. Incidental references to English practice are for the most part laudably accurate. We think, however, it is misleading to represent written judgments as being exceptional in our higher courts, and we doubt whether any trustworthy statistics are available to determine the number of practising as distinct from qualified lawyers in this country. Certainly the Law List alone would not suffice.

An Encyclopaedia of Forms and Precedents other than Court Forms.

By eminent Conveyancing and Commercial Counsel. Under the general editorship of ARTHUR UNDERHILL, assisted by HAROLD B. BOMPAS, CHARLES OTTO BLAGDEN, WILLIAM E. C. BAYNES, HORACE FREEMAN, and HUMPHREY H. KING. Vol. IX. Name, Change of, to Partnership. London: Butterworth & Co. 1905. La. 8vo. xlii and 607 pp. (25s.)

THE preliminary note on 'Naturalization' contains a discussion of the law as to aliens, instructions for aliens applying for certificates of naturalization, and a statement of the effects of naturalization. The explanation of the cases where a special certificate of naturalization is desirable is not, so far as we are aware, contained in any of the books commonly found in the library of the practitioner, and will be found useful. The distinction between naturalization under the Acts of 1844 and 1870, the status of persons naturalized under a Colonial Act or Ordinance, the methods of renouncing and resumption of British Nationality and the procedure of naturalization by special Act of Parliament are explained. There is a full collection of the forms to be used on application for naturalization or denization.

Under 'Novation' only novation caused by a new contract being substituted for an old contract between different parties is discussed. There is a collection of precedents adapted to the cases of common occurrence.

The preliminary note on 'Open Spaces' contains a very useful account of the Statutes under which land may be given or acquired by Local

Authorities for purposes of recreation of the Public. There is a full collection of precedents which are not to be found elsewhere, and the precedents are elucidated by copious notes.

There is a large collection of forms under the head 'Parcels.' The writer has pointed out that in making reference to the Ordnance maps the edition referred to should be indicated owing to the change of the numbers of the plots in the last edition. In practice we have found serious inconvenience arising from this not having been attended to. The forms will be found useful to the practitioner.

There is a printer's error which should be noted on p. 121, where for 'Farm' is given 'All that messuage or farm house situated &c., known as — Farm with &c.' The farm house alone is not known as '— Farm'; the word 'Farm' means the house and all the land belonging to and occupied with it. This is correctly stated on p. 117.

The most important head in the volume is 'Parliamentary Documents,' which deals only with private Bills and a few cognate methods of private legislation, comprising Provisional Orders legislation and Light Railway Orders under the Light Railways Act, 1896, 59 & 60 Vic. c. 48. The preliminary note contains explanations of the nature of Private Bills and of the different classes of them; of the distinction between first-class and second-class Bills; of the Public Departments which can make Provisional Orders, and of the Statutes conferring the authority to make them. The account of the procedure in Private Bill Legislation contains a statement as to the notices which have to be published in the Gazette, and a somewhat detailed account of what ought to be contained in the Bill, including rules for drafting taken from Sir C. P. Ilbert's 'Legislative Methods and Forms.' The author also states the rules given in the same book for the interpretation of Acts of Parliament.

The procedure with respect to Private Bills is described at some length and with great clearness. The precedents contain (1) Notices, Resolutions, &c. under Borough Funds Acts; (2) Preliminary Notices, Declarations, &c. relating to Bills; (3) Forms of Bills; (4) Forms relating to Wharnccliffe Meetings; (5) Petitions against Bills and Objections on *locus standi*; (6) Forms relating to Provisional Orders made under the Electric Lighting Acts; (7) Forms relating to Provisional Orders under Gas and Water Works Facilities Act, 1870; (8) Forms relating to Provisional Orders dealing with Harbours; (9) Forms relating to Provisional Orders under Light Railways Act, 1896; and (10) Forms relating to Provisional Orders under Tramways Act, 1870, all of which will be found very useful.

Under the head 'Parties' will be found—(1) General Descriptions; (2) Descriptions of Particular Persons; (3) Descriptions of Corporations and Associations; and (4) Descriptions of Government offices.

The head 'Partition,' which is excellent, contains a preliminary note, and Precedents—(1) of Partition by Conveyance, and (2) Partition by Order of the Board of Agriculture and Fisheries. The author has wisely framed the Precedents of Partition by conveyance to meet the requirements of ordinary and comparatively simple cases. It would not have been useful to give a form where the interests of the parties are complicated, as the sole difficulty occurs in framing the recitals, and they necessarily vary in each case.

The head 'Partnership' contains a preliminary note, and Precedents of Articles of Partnership, and various deeds relating to Partnerships, a Syndicate deed and notices of different natures. The work, both in the preliminary note and the forms, is good.

We may add that we have used the preceding volumes of the Encyclopaedia in practice, and that our experience entirely bears out the high opinion of them expressed in this Review. All we need say of the present volume is that it is a worthy companion of its predecessors, and that we strongly recommend the profession to use it.

Wolstenholme's Conveyancing and Settled Land Acts, with Notes and Rules of Court. Ninth Edition. By BENJAMIN LENNARD CHERRY and ARTHUR EUSTACE RUSSELL. London: William Clowes & Sons, Lim. 1905. 8vo. xlv and 586 pp. (25s.)

THE criticism of a ninth edition may justifiably differ, both in quantity and kind, from criticism of the first edition of the same book. The present work has a recognized place and value among conveyancers, and its scheme and merits are well known. A perusal of the new edition, however, suggests that, without departing from the scheme of the book, its usefulness might have been considerably increased by such additions and revision as readers expect to find in a book which has passed through so many editions. In the first place nearly all textbooks give the date of a case in citing it. Again, most textbooks now give references, in citing a case, to all the reports of it. The omission of dates, and of references to contemporary reports, however excusable in a first edition, should not be ground for criticism in the ninth edition. There are other indications of want of thorough revision. One of these is the omission to cite Acts of Parliament by their short titles—the Short Titles Acts having been passed since the first publication of the present work in separate volumes.

The two books, in fact—the 'Conveyancing Acts' and the 'Settled Land Acts'—have not lost certain characteristics which distinguished them when published separately. For instance, the treatment of the first part of the present volume, dealing with the Conveyancing Acts, is much more compressed than the treatment of the last part—dealing with the Settled Land Acts. Occasionally, decisions are referred to so shortly as to be almost misleading. The cases of *Blaiberg v. Abrahams* and *Westminster Fire Office v. Glasgow Provident Society*, referred to on pp. 82, 83, are instances of this. The colonial case of *Larkin v. Drysdale*, cited on p. 94, one of the few colonial cases which have found their way into English textbooks, is not an authority for the proposition in support of which it is cited.

Maxwell on the Interpretation of Statutes. Fourth Edition. By J. ANWYL THEOBALD. London: Sweet & Maxwell, Lim.; Toronto: The Carswell Co., Lim. 1895. 8vo. clxii and 670 pp. (25s.)

SIR PETER MAXWELL'S book was the earliest of recent English works on the general interpretation of statute law, and still holds its ground along with Hardcastle's book on the same subject. It is not easy to sum up the comparative merits of the two works, as each surpasses the other in different departments of the law with which they deal. As an instance, however, in which Maxwell is vastly superior, we may take the treatment of imperative and directory statutes, to which he devotes twenty-two excellent pages, whereas the same matter is dealt with in Hardcastle in a much less thorough way in two or three different parts of his book. On the other hand, the interpretation of statutes as applied to the Crown has

always seemed to us to be more usefully treated by Hardcastle than by Maxwell.

In the present edition the editor has had the assistance of Mr. A. B. Kempe, who was responsible for the third edition, and the combination has been fairly successful. He apologizes for the increased size of the book, which he attributes to 'the development of municipal legislation and the great increase in the number and scope of by-laws made by local authorities under statutory powers.' We could wish that the book contained a compact treatment of the conditions of validity of by-laws and the power to make them. At least, if it does contain such a treatment, we have been unable to find it in the index. On p. 446 we do find a statement that by-laws must not be unreasonable, nor in excess of the statutory power, nor repugnant, and this statement is illustrated by a note containing no less than twenty-five cases of every sort and description without any comment. Of what use is such a note as this to the busy practitioner? And even this amorphous list is not complete. We could give the editor at least five cases on tramway by-laws, of which the book makes no mention. And where is the Scottish ice-cream case?

We have noticed a misprint or two: 'Gereundeuse' (p. 226, note (a)) should be 'Gerundeuse.' Note (d) on p. 204 ought to be amended in view of observations made in *Hornsey U. D. C. v. Hemmell*, which is duly noted on the following page. In note (e) on p. 206 the proper effect of *Rustomjee v. R.* is not stated. Something should be said about the law that codes of procedure, e.g. as to discovery, do not bind the Crown without express mention; and *Thomas v. R.*, L. R. 10 Q. B. 44 and *Tomline v. R.*, 4 Ex. D. 252, should be cited.

Bullen and Leake's Precedents of Pleading. Sixth Edition. By CYRIL DODD, K.C., and T. WILLES CHITTY. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1905. 8vo. lxxii and 1066 pp. (£1 18s.)

'My lord, I 'old in my 'and the latest edition of Bollen and Leake,' an eminent Q.C. is said to have protested in answer to the objurgations of the Bench, and we have always felt that, whatever criticisms might be passed on his English, his legal contention, supported by such eminent authority, must have been unassailable. There has been a good deal of change in 'Bollen and Leake' since those days, and for many purposes the practitioner prefers to turn to the book as it stood under the old practice. But it has been fortunate in a succession of excellent editors, of whom the present editors are not the least eminent.

Eight years have elapsed since the last edition, and the book now reappears, with a smaller number of pages indeed, but in reality of considerably greater magnitude owing to an enlargement of the *format*. Parts of the work have been recast, e.g. the remarks on pleading in general are now embodied in the 'Introductory observations,' and the treatment of replies and subsequent pleadings is separated from that of defences. The dissertations on venue and change of venue disappear, since the venue is now fixed by a subsequent order. We find forms of defence based upon the Workmen's Compensation Act, 1897 and the Money-lenders Act, 1900, and the editors draw our attention to new and valuable headings, which deal with trade disputes, and claims arising out of Stock Exchange transactions. We are glad to observe that they have restored many references to cases under the old system of pleading, which may obviate to a large

extent the necessity of occasional resort to the older editions of the work to which we have already referred. It is easy to appreciate the difficulty, which they mention, arising from the modern practice of pleading material facts, instead of the legal result of such facts. The only way to deal with it, so as to enable such a work as this to retain its usefulness, is that which they have adopted, namely, to increase the number of forms given and to draw these as far as possible from pleadings which have actually been used in practice. It may well be that it will be ultimately found desirable to make the book even more of a formulary than it is at present, by adding an even greater number of forms and omitting some of the elaborate notes, which, after all, are not always strictly concerned with matters of pleading, but are apt to stray into ground covered by such books as Roscoe on *Nisi Prius* Evidence. May we add, too, that from our own experience we should welcome the addition of a table of statutes, and perhaps also of rules, referred to in the book? It is perhaps due to the absence of such an index that we have been unable to find any reference to the Shipowners' Negligence (Penalties) Act, 1905. The book in other respects seems to have been brought right up to date; see, to take an instance, the note on the Public Authorities Protection Act, 1893. If we may criticize a couple of small details (there is little else to criticize), we fancy the official method of citing the Irish Law Reports is [1905] 2 I. R., and not Ir. R., and that the Scottish Court of Session reports should not be referred to as 5th Ser. Sess. Cas. vol. vi, but as 6 F.

The Annual Practice, 1906. By THOMAS SNOW, CHARLES BURNBY, and FRANCIS A. STRINGER. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 8vo. Two vols. (or two vols. in one). ccxvi and 2088 pp. (25s. net.)

The A B C Guide to Practice, 1906. By F. A. STRINGER. Fourth Edition (same publishers). xvi and 187 pp. (5s. net.)

The Yearly Supreme Court Practice, 1906. By M. MUIR MACKENZIE, T. WILLIS CHITTY, S. G. LUSHINGTON, and JOHN CHARLES FOX, assisted by P. M. FRANCKE, E. CHURCH BLISS, and WILLIAM W. LUCAS. London: Butterworth & Co. 8vo. clxiii and 1375 pp. (20s. net.)

THESE three well-known practice books again appear. 'The Annual Practice' contains the Rules of the Supreme Court of July, 1905, and the Supreme Court Funds Rules, 1905. The Directions to Agents and the Standing Orders of the House of Lords have been re-read, and recent amendments therein have been introduced. The sizes of the two volumes have been slightly altered by removing certain matter from Vol. I to Vol. II. This, however, will not affect the many persons who now buy the two volumes bound together. The notes to the Admiralty rules have been revised by Mr. Burleigh D. Kilburn, and the notes to the Pleading Orders by Dr. Blake Odgers, while Master King has sent in more notes on taxation, and Mr. Manson has increased the scope of the Index. Mr. William Stone is responsible for the Tables of Cases and Statutes, and many other friends have afforded valuable suggestions. The authors are to be congratulated on the skill shown in keeping the size of the work down, without omitting what ought to be retained.

The A B C Guide has been enriched by the addition of several new

titles, and the amplification of the matter of some of the old ones, without much increasing the size of this still 'handy guide to procedure.'

'The Yearly Practice' also contains the new rules and orders. The kindred subjects of attachment and committal are more fully dealt with, and many fresh notes have been added to those referring to other subjects. The authors acknowledge the valuable assistance rendered by the three assistant-editors, two of whom are new, by Mr. W. H. Rowe, the Assistant Paymaster-General, and by Mr. G. A. Hyem, of the Chancery Division Chambers.

Encyclopaedia of Local Government Law (exclusive of the Metropolis).
 Edited by JOSHUA SCHOLEFIELD. Vol. I. London: Butterworth
 & Co.; Shaw & Sons. 1905. La. 8vo. lxxxviii and 602 pp.
 (25s.)

MESSRS. BUTTERWORTH & Co., encouraged by the success of their *Encyclopaedia of Forms and Precedents*, have undertaken the publication of a cyclopaedic work on Local Government to be completed in five or six volumes. It is intended to treat of the whole law of Local Government, except so much as relates to the Metropolis and to the Poor Law. In view of the large range of subjects included, it is a pity that space has not been found for the Poor Law—a branch of the law which in practice as well as historically is intimately related to other branches of Local Government. The Poor Relief Act of Elizabeth is the foundation upon which a very large part of the elaborate structure of Local Government has been erected.

The published list of contributors gives promise of good work, among them being the authors and editors of many of the best known textbooks. And if the later volumes come up to the high standard of the first, the encyclopaedia will be invaluable.

One of the best of the articles in this volume is that entitled 'Actions by and against Local Authorities,' for which Mr. Macmorran and Mr. Scholefield are jointly responsible. It is full of information on points of pleading and practice peculiar to actions of this kind, and contains useful notes on such topics as the rights of individuals to enforce general statutory duties, mandamus, indictment, and the necessity for making the Attorney-General a party. A collection of the authorities upon these matters is of great value. We have often experienced difficulty in finding them, and rejoice that we now have them at hand.

Mr. J. W. Baines contributes a luminous article on Areas of Local Government, containing a general sketch of the administrative areas and authorities for local government purposes. The present state of the law seems to be stated with as much accuracy and completeness as can be looked for in such an article, but his history seems to be at fault when he says that 'in some districts . . . the ancient parishes were often very extensive and were divided for civil purposes into townships, which acquired the right to appoint their own overseers or to be separately rated.' Surely parishes were never divided into townships, though several townships were often grouped in one parish. The township is a far more ancient 'local government area' than the parish, and it was constituted a separate poor law area, appointing its own overseers, by the Poor Relief Act, 1662.

Besides those already mentioned there are notable articles on 'Account and Audit' by Mr. A. O. Hobbs, on the 'Acquisition, Sale and Letting of Land' by Sir Ralph Littler and Mr. G. R. Hill, on 'Adulteration' by

Mr. F. J. Coltman, and on 'Allotments and Small Holdings' by Mr. W. Addington Willis. This last contains an admirable and complete account of the various kinds of allotments under sundry Acts, ranging from the Poor Relief Act, 1601, to the Local Government Act, 1904. It contains a few slips, due to insufficiently following out the operation of the last-named Act upon the earlier Acts in transferring powers of the old authorities to the new; but these are not of a character to be seriously misleading.

A work such as this is necessarily somewhat incomplete. So much of the law is statutory that no exposition of it can be quite satisfactory unless the statutes are set out in full. Paraphrases are in their nature unsatisfying. Moreover, in a branch of the law in which every year there are many new statutes and decisions a book must soon get out of date, and it can hardly be expected that new editions will be frequent.

Nevertheless in the hands of a reader who will be content to use it only as a map directing him to the fountain heads of the law, and not as itself a source of knowledge, it will prove of great value.

A Digest of Equity. By J. ANDREW STRAHAN and G. H. B. KENRICK. London: Butterworth & Co. 1905. 8vo. xliii and 541 pp. (15s.)

THIS is a praiseworthy attempt to expound the main principles of Equity in a concise and somewhat original form, but the work strikes us as being less a digest of Equity than a summary of principles. The work is divided into three books, the first dealing with Jurisdiction, the second with Equitable Rights, and the third with Equitable Remedies. The second book, which forms the bulk of the work, is divided into three parts, viz. Equities to protect confidences, Equities to promote fair dealing, and Equities to prevent oppression. This classification is, so far as we know, a novel one, but it is not altogether happy. To deal with trusts under the heading of 'Equities to protect confidences' is scarcely accurate. Confidences are not protected unless they are intended to be trusts. That was laid down by the Court of Appeal in *In re Adams and Kensington Vestry*, 27 Ch. D. 394. It is not therefore strictly correct to treat the protection of confidences as a branch of equitable rights, nor do we see that any useful purpose is served thereby, especially as the heading in question includes nothing but trusts. With regard to the other two divisions of the subject, they also seem to be somewhat arbitrary. To promote fair dealing is to prevent oppression, and vice versa. It is difficult to see any clear dividing line between the two, and this is shown by the fact that matters are placed in the second division which might, with at least equal propriety, have been placed in the third.

If, however, the form and arrangement of the work do not appear to us to be quite satisfactory, we can at least heartily commend the substance. The principles are lucidly stated, the cases illustrating them are carefully chosen, and the effect of them is correctly given. The work is, in short, a concise and clear exposition of the leading principles of Equity, and as such it should be of great use to students, for whom no doubt it is principally intended. The book, however, would be all the better for a fuller index.

The Rights and Liabilities of Husband and Wife. By JOHN FRASER MACQUEEN, Q.C. Fourth Edition by WYATT PAINE. London: Sweet & Maxwell, Lim. 1905. La. 8vo. lxxxviii and 579 pp. (25s.)

TWENTY years have passed since the publication of the last edition of this work, and, to use the words of the Editor, 'the nebulous and at that time indeterminate effect of the provisions of the Married Women's Property Act, 1882, have (*sic*) to some considerable extent been crystallized.' Consequently, he goes on to say, 'the Act has introduced into domestic life those sound principles of limited liability which in business corporations have tended so materially to enhance the trade and aggrandize the wealth of the community in the larger sphere of public life.' We are not prepared to give an unqualified assent to this latter statement as to the effect of the Act, nor is it necessary for us to do so. It is enough to say that the Act has effected many and important changes in the law of husband and wife, all of which changes have been duly and carefully noted in the volume now before us. The work, however, is by no means exclusively or even mainly concerned with the Married Women's Property Acts. On the contrary it is exceedingly comprehensive, and deals not only with married women's property but also with divorce, breach of promise, criminal liability, summary jurisdiction, the custody and maintenance of children, *et hoc genus omne*. In fact it omits nothing germane to the subject which could be usefully included.

That is, however, a general view of the book. Descending to detail, we notice the omission of some cases which we think might have been usefully cited. For instance, the case of *In re Duke of Marlborough, Davis v. Whitehead* [1894] 2 Ch. 133, might have been given as a modern illustration of a wife's equity of redemption. On another point *In re Atkinson, Waller v. Atkinson* [1898] 1 Ch. 637, might have been cited. Further we notice that the effect of some of the cases is insufficiently stated or not stated at all, as for instance *Paget v. Paget* [1898] 1 Ch. 470, the effect of which is in no way indicated, though it seems to us a decision of some importance.

These, however, are matters of minor importance, and do not appreciably affect the merits of a book which should prove of great use to all those who have to consider any of the many difficult points which arise out of the relation of husband and wife, a subject which the author justly remarks is one peculiarly fertile in legal difficulties.

A Handbook of Practical Forms. By H. MOORE. Fourth Edition by EDWARD MANSON. London: William Clowes & Sons, Lim. 1905. 8vo. xxix and 591 pp. (20s.)

'MOORE'S Practical Forms' is a book too well known to require a lengthy notice. It consists of a number of miscellaneous forms needed in the every-day routine of a solicitor's office. The editor has preserved the original scheme, and has made only such additions and alterations as seemed to him necessary to bring the edition up to date. He has added new forms relating to Death Duties, Land Registration, Bankruptcy, and other matters. Many of these are official forms, which the solicitor obtains ready printed from the proper authority, and they might well have been omitted.

Under 'Apprenticeship' we find the form of apprenticeship to the Sea Service issued by the Board of Trade, but for some reason the prescribed

form of apprenticeship to the Sea Fishing Service is omitted without comment. A form of apprenticeship by Guardians of the Poor would have been more useful, as there is no official form in use.

In the notes to the ordinary deed of apprenticeship we are surprised to find it stated that 'the consideration must be truly stated in words at length.' The authority is *Jackson v. Warwick*, 7 T. R. 121, decided on a long obsolete Stamp Act, 8 Anne c. 9.

We think also that the forms might be better arranged by being grouped according to their subject-matter. Thus all arbitration forms should be under that heading, instead of appearing under the several headings 'Arbitration,' 'Appointment,' 'Declaration,' and 'Notice'; and the page headings should indicate the subject-matter of the page. They are merely 'Practical Forms' throughout.

The Law and Practice relating to Solicitors' Liens and Charging Orders.

By FREDERICK WALTON ATKINSON. London: Sweet & Maxwell, Lim. 1905. 8vo. xxxvii and 224 pp. (7s. 6d. net.)

MR. ATKINSON is well qualified to write on solicitors' liens, not only by his experience as a solicitor, but by his diligence in collecting authorities and his mastery of principles; and he has produced an excellent and well-ordered treatise on a somewhat intricate topic. The author treats severally of 'liens on paper, deeds, and other documents,' 'liens on funds and other property,' and charging orders under section 28 of the Solicitors Act, 1860. To each of these topics he devotes a chapter in which he sets out what property may be the subject of the lien or charge, by and against whom and in respect of what claims it may be asserted or obtained, how it may be resisted, and what are the remedies and procedure. An appendix contains a number of useful forms and precedents. Whilst the book has been on our table for review we have had occasion to refer to it on several points, and have in each case readily found a correct solution of the problem before us.

The work might be made more useful by the inclusion of the details of practice, or at least references to the Orders and Rules applicable thereto, and the appendix of forms might be improved by appending to each form a note showing what stamp the document requires.

In some matters of detail the book has imperfections, which indicate want of final revision. There is an unusually large number of Addenda, consisting of matter which might well have been incorporated in the text: the dates of cases and duplicate reports are given in many instances, and in others are omitted: usually, but not always, cases in the Court of Appeal are distinguished by the addition of the syllable 'App.'; and there are some loose or doubtful expressions used, such as 'a solicitor has ... a right of property in the lien' and 'a general lien is a lien to secure ... all other debts and the balance of account.'

These are faults which may be, and, we confidently expect, will be, remedied in future editions.

A Manual of the Law of Principal and Agent. By JAMES BIGGS PORTER.

London: Stevens & Haynes. 1905. 8vo. xii and 160 pp.

Handbook of Commercial Law. By FREDERICK GEORGE NEAVE.

London: Effingham Wilson. 1906. Sm. 8vo. vii and 260 pp.

MR. PORTER has managed to include a great deal of information in a small space. This is in a measure due to his ability to compress much

information within a few words. He has also adopted the wise course of limiting the number of cases cited by referring, as a general rule, to the latest and most authoritative only. For instance he cites the decision of the Exchequer Chamber in *Sharman v. Brandt* (1871) L.R. 6 Q.B. 720, and omits the earlier ruling at Nisi Prius in *Wright v. Dannah* (1809) 2 Camp. 203, 11 R.R. 693; and the intermediate decision of the Court in Banc in *Farebrother v. Simmons* (1822) 5 B. & Ald. 333, 24 R.R. 399. But he does not require us to sever old friendships. *Whitehead v. Tuckett*, *Paterson v. Gandasequi* and *Thomson v. Davenport*, and other well-known cases, appear in their proper place. We should like to interpose here the suggestion that in future editions of this book, the reference to the original report of any leading case should be supplemented by a reference to the volume and page of the then current edition of leading cases in which it is to be also found. We have no option but to point out now the one serious mistake in the book. At p. 31 it is stated that 'if an agent appointed by parol to purchase land for his principal has made the purchase in his own name, and has obtained a conveyance of the legal estate to himself, thus becoming no longer simply an agent but a trustee, then it seems that sect. 7 of the Statute of Frauds which requires a trust to be declared in writing, would constitute a good defence to an action by the principal against the agent claiming a conveyance to himself.' This is asserted on the authority of *James v. Smith* [1891] 1 Ch. 384. But on turning to the report, it will be found that it is only a dictum, for both in the court of first instance and in the Court of Appeal it was held that the evidence did not establish agency in fact: *W. N.* [1891] p. 175. But the question was set at rest by the Court of Appeal in *Rochevoucauld v. Boustead* [1897] 1 Ch. 196, which has unfortunately escaped the learned author's researches. As was said by Lindley L.J. in that case 'notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land for himself.' Indeed, if it be admitted that the agent cannot enter into a contract to purchase the land in his own name, except as a trustee for his principal, which is what *Heard v. Pilley* (1869) L.R. 4 Ch. 548, decided, then it seems clear that the trust is one arising by implication or construction of law, and expressly excepted out of the Statute of Frauds by sect. 8. One or two small matters to which exception might be taken have not escaped us, but we forbear to refer to them in detail, as they are either unimportant, or unlikely to mislead any but the careless. We think that Mr. Porter has succeeded in writing a book, in which the main points relating to the law of principal and agent are to be found in an accessible form.

Mr. Neave's book is accurate and covers much ground, but we venture to doubt if it will be found of much assistance to the practitioner or legal student. We should infer that it is intended for laymen only. If this be so, it will probably find a place among current legal literature.

L'Ius Papirianum da Glück ad Hirschfeld. DI ANTONIO ZOCCO-ROSA.
Torino: Fratelli Bocca. 1905.

THIS pamphlet has been called forth by the recently propounded theory of Hirschfeld that the work entitled *Monumenta*, published by the Republican jurist Manilius and mentioned by Pomponius in his *Enchiridion* (Dig. 1. 2. 2. 39), is identical with the *Monumenta* which Cicero makes

Scipio cite in the *De Republica* (ii. 14, 26) as containing certain laws of Numa. The author disbelieves in this identification, perhaps with justice. At least he scores a point when he remarks that the very fact that Manilius is an interlocutor in the Dialogue makes it improbable that Scipio's very impersonal reference ('Propositis legibus his quas in monumentis habemus') should be a reference to Manilius's collection. This, however, is one of those very delicate questions of probability which form such a slippery path for the critic. A collection of documents (*Monumenta*) formed by a jurist is not exactly a work of his. It is conceivable that one might at the present day speak of inscriptions to great epigraphists without deeming it necessary to acknowledge their labours.

The theory of Hirschfeld, however, if it be accepted as correct, makes the leading difficulty about the *Ius Papirianum* almost greater than it was before. It postulates a collection of the *Leges Regiae* about two generations earlier than that of Granius Flaccus. But why should the mysterious Papirius, with his varying *praenomina*, appear only at the later date? He is not mentioned by Cicero and first springs into existence with Dionysius. That Papirius was an invention of the post-Ciceronian period seems impossible; the problem resolves itself into one of nomenclature. It is not capable of solution; but the conjecture may be hazarded that even in Cicero's time the vitality of the *Leges Regiae* was not impaired by the prominence of the name of the supposed ancient redactor; whereas the commentary of Granius Flaccus may have professed to be but the renewal of the work of the Pontiff who had preserved these ancient ordinances.

Although Hirschfeld's theory has been the stimulus for the production of this monograph, the author has made this renewal of an old question merely the occasion for a thorough-going review of the literature of the subject since Glück, towards the end of the eighteenth century, wrote his *De iure Papiriano liber singularis*. He is not, however, content even with this upward limit; for he makes occasional reference to the opinions of earlier students. As a bibliography of opinions on the form and character of the compilation known as *Ius Papirianum* this pamphlet is very valuable. It is also very readable. The style is lively, and the mode in which fantastic theories are negatived is amusing. But it is too short to be more than a critical summary of opinions; and the grounds on which the author negatives the successive theories are too briefly and uncompromisingly stated. He is too exigent in his demand for proof. If we waited for proof (in the sense of documentary evidence or distinct historical allusion) there could be no such thing as a reasoned history of early Roman law. The function of the historian, like that of the philosopher, is to wonder and conjecture. Every thinker, who is not content to leave his material in the chaos in which he finds it, is bound to create some unity of his own; and the combination deserves consideration unless it is clearly inconsistent with admitted facts, or until it is replaced by a wider synthesis. There are, of course, limits to the legitimacy of the exercise of such imaginative reconstruction; and the author is justified in his strictures of the attempts made to get at the actual headings of the Papirian work. The subjects treated are fairly well known; but to argue from subjects to arrangement in a work known only from casual citations is a task beyond the powers of the most penetrating criticism.

There is one controversy presented in the course of this review of literary theories, which is remarkable because unnecessary. It is the controversy that has gathered round the very simple and natural title *Ius civile Papirianum*. One would suppose from the language of the controversialists

that *ius civile* was a narrow and technical expression in all contexts. But 'the right of the *civitas*' is a sufficiently appropriate title for a collection of ordinances sacred and profane. That *ius* and *fas*, although often contrasted as subdivisions of all law, were not mutually exclusive, is shown by the language of the Roman draftsman:—*Si quid sacri sancti est quod non iure sit rogatum*. If one wished to comprehend both types of national law, it is difficult to see what other expression than *ius civile* could be used. The comprehensive character of the expression, in its application to the Papirian compilation, may be a sign of its antiquity. It may have been found, not invented, by Granius Flaccus.

The study of the *ius Papirianum* here presented to us deals wholly with its structure and its literary phases. These are interesting and important points; but they must always rank as secondary, in historical and legal importance, to the questions presented by the actual contents of the compilation that have come down to us. It is through a review of these contents that we can predicate an authenticity for the ordinances which is independent of any author or any redactor. The antiquity of many of these pontifical rules and observances is beyond dispute; and their very strangeness and remoteness suggest the probability of an early redaction, if not of an early Papirius.

The Law of Mortmain. By THOMAS BOUCHIER-CHILCOTT. London: Stevens & Haynes. 1905. 8vo. xx and 234 pp.

THIS is a thoroughly practical treatise, containing the text of the Mortmain and Charitable Uses Acts, 1888, 1891 and 1892, with explanatory notes. For the benefit of students there is an introductory chapter headed 'Evolution of Mortmain,' which renders the book as suitable for them as for the practitioner. We should not have thought that the case law on the subject of gifts savouring of realty was obsolete, as there may still be gifts of that character to charities to take effect after a life estate contained in a will made before August 5, 1891, but we are not prepared to challenge the learned author's view that they may be disregarded. At any rate it is a topic the importance of which is diminishing daily. We regret to notice occasional signs of haste or carelessness, but in view of the general excellence of the book, we forbear to specify them.

Trade Unions and the Law. By DOUGLAS FALCONER PENNANT. London: Stevens & Sons, Lim. xxxi and 146 pp. (5s. net.)

THIS is a small and cheap, but new and valuable addition to the works on the law as to trade unions—which, as the author remarks, is a branch of the law 'in very vigorous growth at the present time.' The introduction contains a lucid history of the growth of trade unions and the laws from time to time relating to them. Chap. I deals with membership, and Chaps. II to IV with unions and workmen, unions and employers, and unions and the public. The three remaining chapters relate to the criminal law applicable to unions, their property, and their registration. Whether this is the best division may be open to question, but the question is one on which opinions might well differ.

We have also received:—

The Law of Carriage by Railway. By HENRY W. DISNEY. London: Stevens & Sons, Lim. 1905. Demy 8vo. xvi and 232 pp. (7s. 6d.)—This little book is compiled from lectures delivered by the author at the

London School of Economics, to an audience composed mainly of railway men. It modestly hopes that it will be of assistance to other persons engaged in a similar occupation, and we have no doubt that it will. The carriage of goods, animals and passengers is discussed clearly, succinctly, and with accuracy.

Constitutional Law of England. By EDWARD WAYELL RIDGES. London: Stevens & Sons, Lim. 1905. 8vo. xxxii and 459 pp. (12s. 6d.)—This book is described by the author as a compilation. It would be more useful if the sources from which it was compiled were more fully and specifically acknowledged.

Courts and Procedure in England and in New Jersey. By CHARLES H. HARTSHORNE. Newark, N. J.: Soney & Sage. 1905. 8vo. xiii and 233 pp.—New Jersey still has separate courts of law and equity with substantially the old procedure. Mr. Hartshorne explains the improvements effected in England by the Judicature Acts and holds them up for imitation. So far as we have observed, his statements are quite accurate.

I presupposti filosofici della nozione del diritto. By GIORGIO DEL VECCHIO. Bologna: Nicola Zanichelli. 1905. La. 8vo. 192 pp.—The learned author holds a chair of the philosophy of law at Ferrara. This is an elaborate book of critical prolegomena, showing wide acquaintance with Italian and German literature, much less with French, very little with English, and none with American. Negatively the author holds that empirical and historical methods cannot of themselves produce philosophical results: *quod verum*. His positive doctrine is not yet disclosed, or we have failed to discover it.

Die ökonomische Entwicklung Europas . . . Von MAXIME KOWALEWSKY [authorized translation from the Russian]. III. Englische, deutsche, italienische und spanische Wirtschaftsverfassung in der zweiten Hälfte des Mittelalters. Berlin: R. L. Prager. 1905. 8vo. 501 pp. (M. 7. 50.)—It would hardly be profitable to most of our readers to report fully on a German translation from a Russian original of which the date and place of publication do not appear, dealing largely with matters accessible in English. We observe that Prof. Maitland's and Mr. Round's work is used, but Prof. Vinogradoff's 'The Growth of the Manor' is not, and Dr. Lieberman's critical edition of the Anglo-Saxon laws appears to be ignored. Mr. Kovalevsky's general competence is, of course, beyond question.

The Law and Customs of the Stock Exchange. By RUDOLPH E. MELSHEIMER and SAMUEL GARDNER. Fourth Edition by WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim.; Effingham Wilson & Co. 1905. 8vo. xxiii and 237 pp. (7s. 6d.)—This book has been enlarged and a great many additional cases have been added since the publication of the third edition in 1891. The Stock Exchange Rules and Regulations are given in the Appendix.

The Law Annual, 1906. Edited by GEOFFREY ELLIS and MAX A. ROBERTSON. London and Edinburgh: Wm. Green & Sons. 8vo. Each section paged separately. (8s. net.)—This work, in addition to the usual legal information, contains sections dealing with Contract and Commercial law, Bankruptcy, Companies, Landlord and Tenant, Master and Servant, Criminal law, Summary Jurisdiction and Licensing, Solicitor and Property, Conveyancing and Chancery. The text of the principal Acts governing the law in each section is given. There are also a 'Dictionary of Points of Law,' and a section on Colonial law—the latter compiled by Mr. Justice Wood Renton, of Ceylon.

The General Principles of the Law of Corporations (Yorke Prize Essay, 1902). By C. T. CARR. Cambridge: at the University Press. 1905. 8vo. xiii and 211 pp. (7s. 6d.)—Review will follow.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS, J. G. PEASE, and A. B. CANE. Vols. LXXVII and LXXVIII. 1846-9 (6 Hare; 2 Phillips; 13 Queen's Bench; 7 Common Bench; 3 Exchequer; 10 Jurist). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1905. La. 8vo. Vol. LXXVII. xiv and 928 pp.; Vol. LXXVIII. xiii and 916 pp.

An Index-Digest of the Cases reported in Vols. I-LXXV. of the Revised Reports. 1785-1845. Compiled by EDWARD POTTON. London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1905. La. 8vo. vii pp. and 954 cols.

Selden Society. Year Books of Edward II. Vol. III. 3 Edw. II. A. D. 1309-10. Edited for the Selden Society by F. W. MAITLAND. (Vol. XX. 1905.) London: B. Quaritch. 1905. 4to. xciv and 224 pp.

Die Lehre der Rechtsouveränität. Von H. KRABBE. Groningen: J. B. Wolters. 1906. 8vo. 254 pp. (M. 4. 50.)

The Law of Repairs and Improvements, including Ecclesiastical Dilapidations. By J. H. JACKSON. London: Butterworth & Co. 1905. 8vo. xliv, 318 and 55 pp. (15s.)

The Annual County Courts Practice, 1906. Edited by His Honour Judge WILLIAM CECIL SMYLY, K.C., and WILLIAM JAMES BROOKS. Two vols. in one. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 8vo. Vol. I. xxxiv and 1183 pp.; Vol. II. vii, 624 and 178 (index) pp. (25s.)

The Yearly County Court Practice, 1906. By G. PITT-LEWIS, K.C. and Sir C. ARNOLD WHITE. 1906 edition by His Honour Judge WOODFALL and E. H. TINDAL ATKINSON, assisted by WILLOUGHBY JARDINE. Chapter on Costs and Precedents of Costs by MORTEN TURNER. Two volumes in one. London: Butterworth & Co.; Shaw & Sons. 8vo. Vol. I. cvi and 1184 pp. Vol. II. xxxii and 622 pp. (25s.)

The Lawyer's Remembrancer and Pocket Book for the Year 1906. By ARTHUR POWELL, K.C. London: Butterworth & Co. Sm. 8vo. 153 pp. (2s. 6d. net.)

Brown and Pooles' Law and Practice in Divorce and Matrimonial Causes. Seventh Edition, re-arranged and re-written by L. D. POWLES. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 8vo. xxii and 789 pp. (25s.)

Statutes of Practical Utility passed in 1905. With Notes and selected Statutory Rules. By J. M. LELY. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1905. La. 8vo. viii and 557-787 pp. (7s. 6d.)

Sweet & Maxwell's Diary for Lawyers for 1906. Edited by FRANCIS A. STRINGER and J. JOHNSTON. London: Sweet & Maxwell, Lim.; Manchester: Meredith, Ray & Littler. 8vo. xxxviii and 483 pp. + Diary. (3s. 6d. net.)

The Law relating to the Taxation of Foreign Income. By JOHN BUCHAN, with a Preface by the Right Hon. R. B. HALDANE, K.C., M.P. London: Stevens & Sons, Lim. 1905. 8vo. lxxxiv and 123 pp. (10s. 6d.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

His address is 13 Old Square, Lincoln's Inn, not Oxford.

THE LAW QUARTERLY REVIEW.

No. LXXXVI. April, 1906.

NOTES.

THE report of the Royal Commission on Trade Disputes and Trade Combinations (1906, Cd. 2825) is a most important contribution to this very troublesome subject. We could hardly have a more weighty joint opinion as to the actual state of the law than that of Lord Dunedin (perhaps still better known as Mr. Graham Murray) and Mr. Arthur Cohen, with which Sir Godfrey Lushington, though taking his own line as to the desirable amendments, is in pretty complete accord. Sir William T. Lewis's dissent, so far as concerned with matters of law, need not be considered among lawyers; and as a lay opinion regarding matters of policy it may at most be set off against Mr. Sidney Webb's general agreement with his colleagues. One result, in the present writer's opinion, is that, notwithstanding Lord Halsbury's emphatic and persistent dicta and some less explicit utterances of other noble and learned lords, the doctrine that conspiracy is a distinct civil cause of action is finally exploded. Mr. Cohen's memorandum (pp. 20-23) seems conclusive. A conspiracy to commit an indictable offence or an act amounting in itself to a civil wrong is a cause of action. An agreement to do something which, if done by one person, would be neither indictable nor actionable, is not a known species of cause of action. Doubtless there are offences not capable of being committed by one person, such as riot; and this is the simple explanation of *Gregory v. Duke of Brunswick*; as to which we may add that, having carefully examined the reports in 6 M. & G. and 6 Scott, N. R., we can find no material variance between them. We believe it can also be shown that on the pleadings no such point as has been supposed was decided or open for decision, but it is not worth while to pursue this (cf. the *Columbia Law Review* for March 1906, at pp. 208, 209).

Another weighty memorandum is on *Allen v. Flood* (pp. 24-30). This is also by Mr. Arthur Cohen, and also has the concurrence of

Lord Dunedin, Sir Godfrey Lushington, and Mr. Sidney Webb. It puts the question: Is a person liable for doing any act which, though not in itself an actionable tort, amounts to an interference with or molestation of another person in his trade, business, or employment? and answers in the negative. We agree that there is no such specific right not to be interfered with in one's business. But then the wider proposition is submitted 'that there is no general rule of law that a person who by some act intentionally does harm to another is *prima facie* liable to him.' We cannot agree with this, and we appeal from it to some words of Lord Bowen which, occurring as they do in a case on a very special subject-matter, appear to have been overlooked in recent discussion. 'At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse': *Skinner & Co. v. Shew & Co.* [1893] 1 Ch. 413, 422, 62 L. J. Ch. 196. In the particular case, no doubt, good faith would have been a 'just cause or excuse,' in the sense that bad faith was a material part of the cause of action; and this is what the context proceeds to expound. But it is not and never was generally true in the Common Law that good faith is a justification or excuse; and Bowen L. J., as he then was, assuredly was not the man to state a legal proposition of the widest import without meaning his words to have their full effect. They would be stultified if 'just cause or excuse' included the fact that the harm done to the plaintiff could not be ear-marked as the violation of a known specific right. Compare the earlier and similar dictum of the same eminent judge in the *Mogul Steamship Co.'s case*, 23 Q. B. Div. at p. 613; this is limited in terms to damage to property or trade, but has been approved without that qualification in an opinion of the Supreme Court of the United States delivered in 1904 by Holmes J. 'It has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. . . . If this is the correct mode of approach, it is obvious that justifications may vary in extent according to the principles of policy upon which they are founded, and while some, for instance, at common law, those affecting the use of land, are absolute . . . others may depend upon the end for which the act is done. . . . It is not sufficient answer to this line of thought that motives are not actionable, and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen'; *Aiken v. Wisconsin*, 195 U. S. 194,

204. We venture to prefer these judicial opinions, without prejudice to the acceptance of Mr. Cohen's practical conclusion.

With regard to the Taff Vale case, the majority of the Commission 'are satisfied that the law laid down by the House of Lords involved no new principle, and was not inconsistent with the legislation of 1871.' The difficulty of suing a trade union was a difficulty not of principle but of parties, which could not be overcome so long as the equitable method of procedure in representative suits was unknown in courts of Common Law, or, since the Judicature Acts, while it was thought that the Rules of Court adopting that method were inapplicable to trade unions. For any resulting inconvenience the proper remedy is not to set trade unions above the law, but to provide facilities for the separation of 'militant' from 'benevolent' funds. Space and time do not allow us to say more at this stage of the recommendations made by the report, or anything of pending legislation. F. P.

A will dealing with movable estate, which was duly executed by an unmarried woman domiciled in England, is not revoked by her subsequent marriage in England to a man domiciled in Scotland.

This is the point decided by the Court of Session, in *Westerman (Westerman's Executor) v. Schwab and Others*, 43 Scottish Law Reporter, 161. The point is a nice one and the textbooks do not throw much if any light on the subject. At first sight it might, on merely logical grounds, appear that the Court of Session had come to a wrong conclusion.

The argument against the judgment of the Court may be thus put: Under the Law of England a marriage revokes any will made before marriage by a testator or testatrix (Wills Act, 1837, 1 Vict. c. 26, § 18). *W.*, the wife, was a domiciled Englishwoman. It was in England that her marriage took place. Up to the moment of her marriage she was admittedly subject to the law of England. No doubt by marriage with *H.*, her husband, who was domiciled in Scotland, she became a domiciled Scotswoman, and thereby subject to Scotch law, under which marriage does not revoke a will made before marriage. But the very act of marrying, which gave her a new domicile, took place under English law and revoked her English will. It may indeed be urged that from and after her marriage her domicile was changed. But at the very moment of her marriage the will was under English law revoked. This argument has a certain logical plausibility, but even as a matter of logic its force is doubtful. *W.*'s change of domicile was simultaneous with her marriage. Till she ceased to be subject to the law of England she was not married; and therefore her will till then

remained valid; the moment that the marriage took place she became subject to the law of Scotland; but under the law of Scotland the will remained valid.

But in truth the matter cannot be decided by logical subtleties, which may be equally well turned now one way and now another. The judgment of the Court of Session is justified by two broad considerations:—

1. The judgment is strictly in conformity with *Loustalan v. Loustalan* [1900] P. 218. It is true that in that case the English Court of Appeal did not determine the point which came before the Court of Session. It is also true that a Scotch Court is by no means bound by an English decision. But, on the other hand, the judgments in *Loustalan v. Loustalan*, though they do not decide the particular point raised in *Westerman v. Schwab*, all rest on the assumption that the effect of a marriage is to be determined by the law of the husband's domicile, and the Court of Session, though in no way bound by the judgment of any English Court, naturally desires that rules as to the conflict of laws should be the same throughout the whole of the United Kingdom, and naturally inclines towards the establishment of a clear and intelligible rule as to the effect of marriage.

2. The judgment of the Court of Session is at bottom in conformity with principle. *W.*'s will was admittedly valid up to the moment of her marriage. The rule of English law, that marriage revokes a will, is clearly intended to apply to persons being and remaining under the law of England. English law has no interest in and does not aim at determining the validity of wills of persons domiciled in another country. *W.*'s will would have been valid if made by a domiciled Scotswoman; it remained valid as long as she was a domiciled Englishwoman. Is there any sound reason why a Scotch court should hold invalid a will that was admittedly valid both in England and Scotland till the moment of *W.*'s marriage, and which would have been valid both in England and Scotland if made the moment after *W.*'s marriage? To answer this question in the affirmative, plausible though the reply may seem, is to sacrifice substance to form, and to invalidate a will held good by Scotch law on a sort of logical fiction, that at the very completion of the marriage ceremony there was a moment when *W.* was still a domiciled Englishwoman though on the point of becoming a domiciled Scotswoman, and that at that imaginary moment she revoked her will.

A. V. D.

Macmillan & Co. v. Dent [1906] 1 Ch. 101, 75 L. J. Ch. 99, raised a new and curious point as to rights of publication. The owners

of certain unpublished letters of Charles Lamb's assigned all their right to publish them (erroneously called copyright) to Smith, Elder & Co., who did publish them in 1898. Smith, Elder & Co. consented to a republication by Macmillan & Co. in 1899. In 1903 Dent bought the originals from the owners, to whom they had been returned. The receipt for the purchase-money purported to assign any other right the owners might still have in the letters, which obviously was none. In 1903 Dent issued a new edition of these among other letters of Lamb's without any further consent. Section 3 of the Copyright Act, 1842, vests the copyright of posthumous publications in the proprietor of the author's MS. and his assigns. Smith, Elder & Co., clearly being such assigns, sued for an injunction to restrain Dent's publication, and consequential relief. It was argued, indeed, that the words 'proprietor of the author's manuscript' do not mean the owner of the material document; but we cannot regard this as anything but a desperate argument, though it seems to have been mainly relied on for the defendant. Then Dent set up a title (acquired after action brought) as assign of Charles Lamb's legal personal representatives. On these facts Kekewich J. held that the Copyright Act not only gives the owner of a deceased author's MS. letters the copyright after publication, but (if we rightly understand him) deprives the author's executors of any right to object to the letters being published.

We cannot agree with this view, whether it is or is not that which the learned judge in truth intended to convey. The Copyright Act deals only with the statutory right of those who have lawfully published books to restrain others from reprinting them for sale. It does not in any way deal with the common-law right, where it exists, to restrain the publication of unpublished matter. The publication mentioned in the latter part of sect. 3 must be taken to be a publication in itself lawful. On the ground of policy, it is incredible that the Legislature should have intended to enable the possessor of every man's private letters to publish them immediately after his death without regard to his wishes (however well known in fact) or those of his family. Conceive the consequence of applying this doctrine to the letters of such a man as Mr. Gladstone or Lord Acton. So far, then, it would seem that the reason expressed by the learned judge cannot be supported.

Nevertheless we think the actual decision right. These letters were published seven years ago without any objection from Charles Lamb's representatives. Now the common-law right of an author's executor is merely negative; and the Court quite rightly held that there is nothing in the Copyright Act to increase it. If he does not possess a copy of any letter, he has no claim on the original in the

hands of the addressee, who is no more bound to produce than to preserve it. He may publish, not because he has any special title to do so, but because no one else can do so without his consent. If the executer does publish, he can acquire copyright, in the proper sense, under the Act. If he stands by while other people publish, there is no reason why they should not acquire copyright against all the world, including himself. He cannot acquiesce for an indefinite time and then come forward with a claim founded on a stale objection. This, we think, would be sufficient for the decision of the case. Further, we submit that the author's right, though called proprietary in the poverty of our legal vocabulary, is in truth a right for the protection of privacy, and not for making gain or levying contributions after the subject-matter has been given to the public. It is in the nature of a personal right and not of saleable property, and, if this be so, the attempt to assign it to a stranger, as a bare abstract right to publish or restrain publication, is inoperative. We understand the case is going to the Court of Appeal, where we trust that full consideration and exposition will be given to a subject admitted on all hands to be still obscure, and not much illuminated by a judgment inevitably addressed to an argument which had 'made that darker which was dark enough without' by mixing up the guiding principles of the law with an adventurous construction of one of the worst penned Acts in the statute-book.

F. P.

The decision of the Court of Appeal in *Elliott v. Crutchley* (see L. Q. R. xx. 109), on a contract with a caterer to supply refreshments for an intended excursion to the coronation review at Spithead in 1902, which expressly dealt with the contingency of the review being cancelled, has been affirmed by the House of Lords [1906] A. C. 7, 75 L. J. K. B. 147. As the judgments are quite short, and proceed wholly on the construction of the special agreement, there is nothing of substance to add to our former note. Indeed, the construction appeared so plain to their Lordships that they did not require any argument from the respondent's counsel.

The Californian manufacturer may well regard the English limited company as a very 'undesirable alien,' and in the future the State of California will probably put the immigrant company on terms when it comes to do business. But the limited liability principle would have sustained a very severe shock if the Court of Appeal had come to any other conclusion in *Risdon Iron & Locomotive Works v. Furness* [1906] 1 K. B. 49, 75 L. J. K. B. 83, than it did. By Californian law every individual shareholder in the English

company was undoubtedly liable for an aliquot part of the debt, and the Californian creditor's contention was that the shareholders, having by the memorandum of association empowered the company to trade abroad and to 'comply with any statutory enactment rule or regulation in any country, colony, or place where the company might carry on business,' gave the company an implied authority to pledge their individual credit to any person dealing with the company in California. The argument was a plausible one, but it ignored an essential factor in the case—the nature of an English limited liability company's constitution. One of the fundamental conditions—the fundamental condition in fact—of such constitution is the immunity of shareholders from all personal liability other than that of paying up their shares, and this immunity—being constitutional—follows the company wherever it goes, and conditions all its contracts. Any powers given by the company's memorandum to comply with the statutory enactment of a foreign country must be read so as not to contravene this primary and paramount principle of the company's constitution. If it does it must be rejected. This is all ABC to us, but the foreign manufacturer may well see in it something of a trap.

'Qui sentit commodum sentire debet et onus' is a very respectable and rational maxim of our law, and it found its application in *In re Glasdir Copper Mines, Lim.* [1906] 1 Ch. 365, 75 L. J. Ch. 109, C. A. There was in that case what is known as a 'debentureholders' liquidation,' and to carry it on and keep the business going as a saleable asset a receiver and manager had been appointed in the usual way at the instance of the plaintiff debentureholders. But money was wanting, and when a company is insolvent and its assets overmortgaged to debentureholders, money is not easy to get. It can only be got in fact by the debentureholders letting in an outside lender to rank before them, or themselves advancing the money. In *Re Glasdir* the debentureholders advanced it themselves, the order which authorized the borrowing stating that it was 'for the purpose of preserving the property of the company comprised in or charged by the security created by the debentures,' and making the borrowed money a 'first charge on such property.' Unfortunately the money was advanced in vain, and when the business came to be realized there was not enough to pay both the loan and the receiver's costs, expenses, and remuneration. Which was to have priority? The Court of Appeal has answered the question by saying, The receiver. The debentureholders take the benefit of his work, and ought to take it with the burden. When the loan is

by a stranger not interested in the administration the conclusion may be different, but as between receiver and debentureholders the equity is all in favour of the receiver. It would be most unfortunate if, as Lord Halsbury said in *Strapp v. Bull*, 'those who take upon themselves the burden of receivership and management should be left to speculate whether or not they would ever be paid anything.'

The decision of Farwell J. in the case of *Nisbet and Potts' Contract* (see L. Q. R. xxi. 105) has been unanimously affirmed by the Court of Appeal [1906] 1 Ch. 386, 75 L. J. Ch. 238. We may therefore take it as settled that an intruder on land of which the true owner is bound by restrictive covenants is no less subject to the burden of those covenants than if he were a purchaser from the owner with notice.

This is plain good sense. We are also to understand from the reasons of the Court that, whatever Lord Cottenham may have thought when he decided *Tulk v. Moxhay*, the effect of such covenants is to create a right in the nature of a negative easement binding, though it still seems we should not say running with, the land in equity. This may perhaps afford matter for discussion among equity lawyers in their spare moments.

To say that Urban cannot expect to enjoy the same repose as Sylvanus or the Bermondsey dweller the quiet of Belgravia is almost a truism. Persons living in a civilized community must have their rights conditioned by their surroundings. The real difficulty is in determining how much annoyance in the shape of smoke, smell, or noise must be put up with before it amounts to a legal nuisance. *Rushmer v. Polsue & Alfieri, Lim.* [1906] 1 Ch. 234, 75 L. J. Ch. 79, C. A., is a good illustration. It was at No. 10 Gough Square, Fleet Street—then probably one of the peacefullest retreats in London—that Dr. Johnson composed his Dictionary. To-day the 'Great Lexicographer,' as Miss Pinkerton used to call him, would find himself, like the innocent milkman at No. 8, hemmed in by printing works whirring, banging, and thumping with demonic energy all day, and some all night. The climax was reached when the defendants in the case set up a new machine next door which ran at night, driven by an electric motor, and turned out from 1,400 to 1,500 impressions per hour. But at what precise point—this is the difficulty—is the Court in such cases to say that the annoyance has culminated, and the reasonable limit of human endurance passed? The plaintiff is surrounded by half a dozen printing works. Peradventure there shall be a seventh printing business set up, is that a nuisance? Peradventure there

shall be an eighth, does that make a nuisance? No doubt the true criterion is the old one of Knight Bruce L.J., the normal man of average susceptibility—not a Carlyle, driven to frenzy by the buzzing of a blue-bottle—not a Wellington or Marlborough with nerves of iron. But how are we to fix the normal type?

In *Re Bourne* [1906] 1 Ch. 113, 75 L. J. Ch. 36, an ingenious attempt was made to limit the rule of *Re Langmead's Trusts*, 20 Beav. 20, 7 D. M. G. 353—namely, that a surviving partner is in the position of a trustee with power to sell and give receipts, and a purchaser from him may rely on his receipt unless he has actual notice of an intention to misapply the money—to dispositions of personal property. The Court rejected this distinction, for which no principle and a very slender show of authority was produced, and held that the rule included an equitable mortgage of partnership real estate by deposit of title-deeds. No reference was made to the language of the Partnership Act: there is certainly nothing in it to give countenance to the unsuccessful argument. It was also held without difficulty that the mortgagee has priority over the lien of the deceased partner's executors.

So many companies, besides those formally dissolved are under the present system summarily struck off the register as defunct for not making returns, that the practice as to getting in the legal estate often outstanding in such companies, ought to be well settled; and so it would be but for the difficulty caused by the decision of Buckley J. in *In re Taylor's Agreement Trusts* [1904] 2 Ch. 737, 73 L. J. Ch. 557. That learned judge could not bring himself to say that a dissolved company is a trustee 'who cannot be found.' Are not such companies, by the way, frequently found, resuscitated, and reinstated on the register under s. 7 of the Companies Act, 1880? In a recent case, *In re No. 9 Bomore Road* [1906] 1 Ch. 359, 75 L. J. Ch. 157, the point has again turned up, and Warrington J. has followed the two decisions of Farwell J., *Re General Accident Assurance Corporation* [1904] 1 Ch. 147, 73 L. J. Ch. 84, and *Re Richard Mills & Co.* [1905] W. N. 36, in preference to that of Buckley J., distinguishing the latter on the ground that what was vested in the dissolved company there was a patent which might well be considered to have disappeared altogether. No critic of Buckley J.'s decision seems to have noticed that the application made to him was simply for a vesting order under s. 35 of the Trustee Act, 1893: he was not asked to appoint a new trustee under s. 25. He had therefore only to deal with the language of s. 35, and on a strict construction of that language his

decision seems perfectly correct. When a new trustee is appointed 'as expedient' under s. 25, as was done in the cases before Farwell and Warrington JJ., a vesting order is consequential, and no difficulty arises.

The Columbia Law Review for March contains a vigorous and acute criticism of the Free Church of Scotland case by Francis B. Lowell. He charges, in effect, that the House of Lords discussed at large every dogmatic and historical question at all connected with the case except the true construction of the actual governing documents, and every kind of opinion except that of the persons who were the actual donors of the funds in question. We extract a few sentences. 'To ascertain the doctrine of the Presbyterian Church of Scotland concerning predestination, Lord Halsbury had recourse to the so-called Synod of Jerusalem in 1672. This Synod represented the Eastern Church in whole or in part, and the Council of Constantinople of 1642, upon which also he relied, appears to have been a similar body. To deduce the doctrine of Scotch Presbyterians from the pronouncement of a Synod of the Orthodox Greek Church, is as extraordinary as would be an ascertainment of the Anglican doctrine of the Eucharist from the decrees of the Council of Trent or from the Institutes of Calvin. With these somewhat unusual notions of ecclesiastical authority in the Church of Scotland, it is not surprising that Lord Halsbury should find differences of opinion where a theologian of training more occidental would fail to discover them.'

It seems convenient to repeat in a conspicuous place that it is not desirable to send M.S. on approval without previous communication with the Editor, except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE CONSOLIDATION OF THE HIGH COURT AND THE COUNTY COURTS.

THE County Courts Act, 1903—the sixteenth of its kind—extends the jurisdiction of these Courts from £50 to £100. Progressives would have preferred to remodel upon a broad and liberal scale an institution which, in spite of many drawbacks and much ill-treatment, has proved itself of inestimable value. They would have thrown its doors wide open. Authority was content that things should remain as they were. The result was a compromise, and its doors were opened a few additional inches.

Those who would study in detail the interesting story of the origin and development of these Courts should consult the excellent pamphlet on the Evolution of the County Court by His Honour Judge Sir Thomas Snagge, LL.D., which gives the fullest information on this subject in the clearest and most concise form.

For the purpose of this article it is not necessary to do more than glance at their early history.

In 1842-6 the cry for simple, speedy, and cheap justice, long heard had become troublesome, and something had to be done.

Each age has its limitations. It was impossible in those days (it was very difficult twenty-five years later) to remodel the elaborate machinery by which the superior Courts of Westminster and Lincoln's Inn majestically settled the disputes of the well-to-do. The numerous 'interests,' whose pleasant pasture-grounds would probably have been disturbed by any change, were far too powerful to be rashly interfered with. So the line of least resistance was taken, and few persons of importance were found to object to a vast addition being made to the existing official patronage—for, from such an overflowing table, crumbs of various sizes might be reasonably expected to fall.

So the old County Courts and Courts of Request went their way, and in 1847 the 'County Courts' of our time came into existence with the not unforeseen result that the Chancellor, Lord Cottenham, 'was given a profusion of immediate patronage, including sixty County Court Judgeships, such as has not fallen to the lot of any Lord Chancellor before or since' (Evolution of the County Court, p. 12).

From then until now two systems, each striving with more or less success to accomplish the same end—the prompt and cheap administration of justice, have been at work side by side throughout the kingdom. Two administrative machines, differing in name, design, and countless details. One labelled ‘superior,’ a brand conspicuously stamped on itself, its officials, and its procedure; the other marked ‘inferior,’ and that distinction carefully maintained and emphasized in every way. Each machine thoroughly equipped, the former lavishly, the latter with a thrifter hand. Each doing its allotted work well, with abundant zeal, skill, and care, and with as much speed as its intricate construction permits.

Looking back from the standpoint of 1906, the handiwork of 1847 seems open to criticism. But it was the best that was then possible. It was never universally admired. Some thought it was conceived and founded in error. What connexion, they asked, was there between a money limit and justice? Is there a ratio between money values and legal difficulties? A claim for £5 or £20 might, and frequently does, give rise to points as subtle and difficult of solution as one involving millions. Moreover to all suitors their own special ‘law business’ is of paramount interest and importance. Have not all an equal right to claim that whether the contest be for little or much—for £10 or £110—the same care and skill shall be applied to its determination? Half a loaf may be better than no bread, but ‘inferior’ justice is, or may be, injustice.

Then why these labels and this double machinery? In connexion with this matter the *Times*, in an article on November 17, 1897, wrote as follows:—

‘Here arises a question that cannot fail to come to the front. The whole theory of the separation between the jurisdictions of the High Court and the County Courts is founded on the assumption that there is a remarkable difference between the qualifications of the judges of the two tribunals—all the fine wheat being collected in London, the coarser grain sent to the provinces. In the best days of the Common Law Bar few excellent lawyers could be got to retire, perhaps to some remote county, for £1,500 a year. Things are now somewhat different. Among the County Court judges are men of great legal attainments and experience, who would be fit to sit in any tribunal. . . . It is not clear why, to name one case out of several in point, the judge of the Westminster County Court should be unfit to be entrusted with original jurisdiction for the trial of libel, or slander, or title to land, or claims over £50, if other judges not more able have jurisdiction as to these matters.’

These questions are indeed coming very much to the front.

Those who uphold the present system are in this difficulty: Are the County Court judges in fact 'inferior' to their brethren of the High Court? Are they, taken *as a body*, deficient in those qualities which we are accustomed to consider as necessary for the proper discharge of the judicial office? If they are, then is it not, to say the least, inconsistent to entrust such gentlemen with power to decide questions in bankruptcy to an unlimited amount, or in the winding up of companies, where the paid-up capital does not exceed £1,000, seeing that in such matters beyond most others, the most difficult and important questions of law are continually arising? If, on the other hand, it is admitted that they are, *as a body*, in no wise inferior in judicial qualities to many of their brethren of the High Court, why insist on this humiliating distinction? Surely the brand should not belie the vintage.

The judges of County Courts are the last men in the world to trouble themselves about matters of this nature, and the 'judicial statistics' show what the people think of the law as administered by these 'inferior' Courts. But there is something of substance behind this. Sixty years ago, and indeed in some instances until quite recent times, the County Court bench was looked upon as a kind of asylum for the unfortunate or the inefficient, or for such friends or relations of the ruling authority as could not otherwise be comfortably provided for. The stipend of these gentlemen was then £1,500 a year, a sufficient, perhaps in some cases a more than sufficient, fee for the work done. Since those days the County Courts have 'evolved' in a way which can only be properly grasped by reading the pamphlet above referred to, but the stipend remains unaltered. A County Court judge, although he may be, and now frequently is, as sound a lawyer as any in the kingdom, still gets his £1,500 a year, his brother judge of the High Court £5,000! And then many of the little things that go to make men happy (through their wives)—all the little embroideries of judicial life—are denied to the County Court judge. No one addresses him as 'My Lord'; scarlet and ermine are not for him; he is never asked to reply to the toast of 'His Majesty's Judges';—no sheriffs, chaplains or trumpeters, not even crowds of 'thirsty yokels' welcome him to his Court town. But probably, save as aforesaid, he rejoices that circumstances have preserved him from a share in these somewhat oppressive honours!

A great awakening has taken place in the last ten years, the nation has shaken itself together; men now care less how a man is dressed, or what he is called. The question is, can he do his work? does he do his work? So of an institution or machine, no matter what it looks like, is it efficient?

Is this dual system efficient? *Prima facie* it would seem improvident to construct and run two machines for doing the work which one, more carefully designed, might be made to do. Would it, for instance, be an efficient arrangement for a railway company to lay two lines side by side to take passengers from London to Bristol, each line of different gauge, governed by a different board, officered by a different staff, with different stations, tickets, and time-tables—one line for first and second class, the other for third class only, the third class ticket three times the price of the others?

Now we have—in this High Court and County Court system—two machines, each of exceedingly elaborate construction, designed by very skilful persons (with too great a leaning perhaps towards minuteness of detail), each machine worked by zealous and competent experts, and each turning out work of excellent quality. But there is no co-ordination. On the contrary, there is friction and overlapping and waste of time and labour in squabbling over small details of very little consequence, and each set of workers has to be acquainted with the bewildering mass of Statutes, Rules, and Cases which regulate the working of each of these machines.

Now it has turned out, contrary to all expectation, that of these two machines the so-called 'inferior' one is in fact the more efficient. For, says the authority above referred to, 'the fact remains that at least two-thirds of what once formed the ordinary business of the King's Bench Division has drifted to the County Court' (*Evolution of the County Court*, p. 31). This really means that twenty-three judges of the High Court do one-third of the work necessary for the administration of justice throughout England, for which they are paid £115,000 a year, whilst about fifty-seven County Court judges do the remaining two-thirds at a cost of about £85,000 a year.

But this 'useful domestic court of all work' is in danger of being overwhelmed by its own success, for from the first the practical public, and more recently the Legislature, has discovered its value, with the result that new burdens are yearly imposed upon it.

Now although it is admitted that this dual system does good work, yet it is not unreasonable to suppose that if it were possible to reconstruct this machinery—by selecting from each system those parts which time has proved to be the most serviceable, and moulding the two into one—very considerable advantages in the saving of time, money, and work, might fairly be expected to result.

The Judicature Commissioners of 1872 certainly thought that

this was not a matter 'outside practical politics,' for they recommended 'that the County Courts should be annexed to and form constituent parts or branches of the High Court of Justice.' That recommendation was not adopted. The 'Sons of Zeruah' ('the interests' of that day) again barred the way. The Superior Courts were remodelled on simple lines, wonderfully free from error, but the County Courts were left out of the scheme, to remain humble annexes to the 'superior' tribunal.

The time would seem propitious for the further consideration of these not unimportant matters, for 'several things have of late happened tending in the direction of levelling up the County Courts or levelling down the High Court' (*Times*, Art., 1 Nov., 1897). The writer, therefore, with unfeigned diffidence ventures, with the Editor's kind permission, to submit to the consideration of the profession some few ideas on the subject of consolidation, for which he is chiefly indebted to the Reports of the Judicature Commissioners, to Sir Thomas Snagge's pamphlet, and to some papers upon imperial organization—but considerations of space require that they should be stated very concisely.

General Policy. Assuming the appointment of a Judicature Commission and the main lines of the scheme settled in some such way as that next indicated, the idea should be to work it out with the least possible disturbance of existing conditions, as regards officers, offices, and vested interests generally. It would be desirable to tolerate many anomalies and inconsistencies until time should make it more easy to deal with them. Continuity of policy might in these days probably be relied upon.

Main Principles. One Supreme Court of Judicature; (a) The High Court of Justice; (b) The Supreme Court of Final Appeal. One practice and procedure.

High Court. From the commencement of the Act the Judges of the County Courts, Palatine Courts, Lord Mayors' Courts, &c., would become (District) Judges of the High Court with the jurisdiction of the High Court (save certain limitations as to Probate and Divorce). Vacancies in the present staff of High Court Judges would be filled, as a general rule (subject to exception in special cases), from the staff of (District) Judges. Salary £3,000 a year. It would be necessary to rearrange the existing circuits, grouping them round, say, fifty of the populous centres in England and Wales in which District Registries of the High Court are already established. One judge to each district, a common law and an equity man in alternate circuits if possible. Special Sessions (see *Evolution of the County Court*, p. 32) to be held periodically at each of the Court towns in which there is a

District Registry. The Bar and Solicitors to have equal right of audience in the High Court (District and Metropolitan). Until the scheme is complete vacancies in the interim, whether in the High Court or County Courts bench, should be filled conditionally, i. e. upon terms as to salary and duties.

The Supreme Court of Final Appeal. In such a scheme as that suggested it would be above all things necessary that there should be a strong Court of Appeal sitting in Divisions (Divisional Courts of the C. A.) to which recourse might be had speedily and cheaply. It is probable that the appeals from the 'District Courts' would at first be very much in excess of the present number of appeals to Divisional Courts of the High Court. There should never be any delay in getting an appeal heard. Judges should always be available. The Court of Appeal would sit in London. The number of the Divisional Courts would depend on the amount of the business. The Court would therefore sit in as many Divisions as the authority might from time to time direct. Its judgments and orders would be final. All English appeals would go direct to this Court, Divisional Courts of the High Court being abolished.

There need be little, if any, interference with existing arrangements. Thus (1) the House of Lords Division and (2) the Privy Council would sit as they sit at present, and would take respectively the English, Irish, Scotch, and Colonial Appeals, which they take now. The House would also take its share in hearing appeals from the High Court—but there would, of course, be no appeal to that House from the judgments or orders of the other Divisions of the Supreme Court of Final Appeal. With regard to these two divisions of the Court, it is probable that having regard to plans for 'Imperial Organization,' which are now being carefully elaborated by many persons of eminence in this country and in the colonies, that as to those appeals which may be called 'external' appeals some special arrangements may have to be made, but as the idea which underlies this scheme is to place the whole of the judiciary of the country in such a position that at the will of the authority selected members of it may be requested to undertake any special matter, for which their individual knowledge and experience would exceptionally qualify them, little difficulty would arise in providing a court which would meet the wishes of the colonies. Probably in the future it may be thought desirable that colonial judges of eminence should be invited to take part in the hearing of certain 'external' appeals, a matter of detail admitting of adjustment.

The other *normal* divisions of this court would be (3) and (4) the Lords Justices. Extra divisions would probably be required

occasionally. In such case the Master of the Rolls might invite a judge of the Ch. D. and of the K. B. D. to assist him, and so form a fifth division, his place being filled by a judge of the K. B. D. invited by the senior Lord Justice. If further extra divisions were required a like process could be adopted by the other Lords Justices, or by L. C. J., or the President P. D. and A. Each division might be manned with a view to the particular class of cases that were on appeal, e.g. the President P. D. and A. with two selected High Court Judges might take a batch of Admiralty Appeals, or a Chancery Lord Justice assisted by one High Court Judge of the Ch. D. and one of the K. B. D. would take Chancery Appeals, and so on.

The authority would have power to order that the hearing of any exceptionally important and difficult case should be heard by a 'full Court' of such judges, and such number of judges as might seem desirable, and also power to order the re-hearing of any case, either by a 'full Court' or by the division which first heard it.

The judges (permanent) of this Final Court of Appeal might be six in number, their salary (eventually) £4,000 a year. The High Court judges called in to take part in forming Divisional Courts of Final Appeal would receive a special fee.

The procedure of the Courts' Divisions (Nos. 1 and 2) should if possible be the same as that of the other Divisions, namely, that of the present C. A., which is quick, cheap, and effective.

Sub-committees. Sub-committees of experts would be appointed to work out the following, amongst other, details: (1) The revision of the rules of the Supreme Court, and the consolidation of such rules with the rules of the County Courts, selecting from each code that procedure which has proved itself to be the most effective. (2) The consolidation of the fourteen Judicature Acts, embodying such of their provisions as are retained in the new Act and repealing the former Acts. (3) The re-arrangement of the County Court Districts. These committees would report to the commissioners, and their draft might also be considered by a committee of judges of the High Court and of the County Courts.

Finance. No scheme can succeed unless it appeals successfully to the economical instincts of the Lords of the Treasury. The present staff of the Supreme Court and of the County Courts numbers about eighty-six persons, and costs in round numbers £232,000 a year, thus (omitting extra sums for circuits)—

23 Judges of High Court at £5,000	£115,000
6 Judges C. A.	31,000
57 County Court Judges at £1,500	85,000
86	£231,000

It may be assumed that by the time such a scheme became ready to be put in action, say four years from the appointment of a Royal Commission, from seven to ten judges of one bench or the other would have died or resigned. If all such vacancies were (conditionally) filled there would then remain a staff of from seventy-seven to eighty judges, all of whom would then become judges of the High Court.

But this number would be in excess of what would be required. Fifty High Court judges in the 'Districts' as rearranged, and twenty in London should be found sufficient because of the greater elasticity of the new system. The number of the permanent judges of the Court of Appeal would remain as at present. The judicial staff of the High Court and the Court of Appeal would then stand thus—

70 Judges of High Court at £3,000	£210,000
6 Judges C. A. at £4,000	24,000
	<hr/>
	£234,000

This does not allow for the 'extra fees' which should be paid to occasional judges at the High Court when requested by the authority to sit as members of extra Courts of Appeal.

As the consolidation of the two systems became perfected, and vested interests died out, other economies would be possible, but they are too vague to be indicated or estimated.

No immediate outlay would be required to set a scheme for consolidation on foot, save such as would be incidental to the appointment of a Royal Commission.

The work of the sub-committee need be no burden to the Treasury. An intimation from the authority that the names of such gentlemen as should be selected for the work would be placed on a list for promotion by seniority to vacancies in the High Court would secure the services of any number of competent men.

Generally. No change would be made in the salaries or status of judges and other officials until lapse of time offered favourable opportunities. The process of consolidation should be conciliatory and gradual, but the lines of the scheme should be determined as soon as possible.

The leading idea upon which this scheme rests is one which was very present to those who planned the Judicature Act, 1873, namely, the necessity of getting rid of 'water-tight compartments.' The judicial staff in all its branches should be essentially 'mobile,' it should be capable of being grouped in any combination that the authority from time to time might think necessary. Delay and arrears should be impossible if the authority was able

to disregard red tape, and *ex mero motu*, promptly apply extra judicial power wherever it was temporarily wanted. Like a well-organized military staff every unit of it should be ready 'to go anywhere and do anything' that called for the doing.

In such circumstances it might be hoped that circuit difficulties would disappear or be diminished.

With Divisional Courts would disappear some harassing questions as to appeals.

The drafting of High Court judges into the Court of Appeal (as extra or occasional judges) would be a valuable training, and would enable the authority to select the most fitting persons to fill vacancies occurring in that Court.

The expense and delay incident to double appeals would be put an end to, and all the judicial power available for appellate purposes would be concentrated in one Court of Final Appeal, to be applied just as circumstances might require. A reform Lord Selborne and his friends earnestly desired to bring about.

The substitution of one revised code of practice and procedure would gladden the heart of many puzzled and weary-eyed practitioners.

Another incidental advantage from 'consolidation' would be that the clerks of the County Courts, to whose skill and diligence the country is much indebted for the popularity and consequent success which those Courts have attained, have for years past been making efforts to obtain recognition as 'Civil Servants.' The limits to the jurisdiction and the special provisions of more than 100 Statutes give rise to many very difficult questions of law and procedure which these gentlemen are daily called upon to solve. In the High Court the Masters, and an expert official especially appointed for that purpose, assist the plaintiff's solicitor in deciding difficult points of this kind, but in the County Courts the plaintiff in person expects and receives such advice and assistance from the clerks in the office, and it would be essential that this perfect machinery now in work throughout the country should, with certain modifications, be retained.

THOMAS SNOW.

MANX LAND TENURE¹.

THIS subject is well worth the attention of every intelligent Manxman.

The authorities indeed are few, but the possibilities of original research are many.

A chapter or two of a manuscript work by Deemster Parr written between 1678 and 1690; a luminous but by no means exhaustive work of the late Deemster Sherwood; a few notes of the late Sir James Gell; and an article by the present Attorney-General for the island in the *Law Magazine and Review* for February, 1905, comprise the authorities such as they are.

From the Record Office, the British Museum, the Herald College, the depositaries of Scotland, Ireland, and Scandinavia, the treasure-house of the Vatican, and other sources could be drawn, I would lay a heavy wager, a rich mine of information which would yield, if properly worked, most interesting, and, it may be, startling results.

1. *The Enigma.*

What was the nature of the tenure of land in this island?

Was it Feudal, or Udal?

At what period did the lords of Mann become the owners of the soil, and the inhabitants begin to hold their land in farm from them? Were such inhabitants ever mere tenants at will of the lord? Is the tenure of Goidelic, Norwegian, Scottish, or English origin, or, on the other hand, is it compounded of all four?

What is the 'tenure of the Straw'?

Again, who were the twenty-four freeholders or *taxiaxi*, 'viiij from the out islands and xvj from your land of Mann'?

And what was the origin of the Baronies?

These are some of the eager questions which rise to the lips of every inquirer into the history of our land tenure.

¹ This article is based upon a paper read before an audience of laymen in the Isle of Mann, and only the barest alterations have been made in the form in which it was orally delivered. I have avoided the irritating plan of making copious references to authorities, deeming it unnecessary in the case of a paper dealing with matters of such elementary knowledge.

II. *The Oracles.*

What say the authorities to the student ?

Good Deemster Parr has one infallible guide, philosopher, and friend in case of difficulty—the Statutes and Ordinances of the Isle of Mann.

Failing to see improvement he copies them—often verbatim—in innumerable chapters.

For Land Tenure he has but one chapter, in which he traces in a very obscure fashion the land setting of poor tenants and the ‘Tenure of the Straw,’ of which more hereafter.

Learned Deemster Sherwood is more explicit.

He leans on the Manorial Rolls, and draws sustenance from their meagre entries in abominable dog Latin.

He describes clearly the system in vogue in Sir John Stanley’s reign, the gradual growth of the estates of customary freehold, the distinctive elements of Lords Land and Abbey Land, Barony and Staff Land, Quarterland, Intack, Mills, and Cottages.

With him as a guide, we tread lightly and safely in the quagmires of legal subtlety environing Intacks of Ease and Intacks of three descents ; we learn when land was considered a chattel distributable amongst the next of kin of a deceased owner, and when it descended untouched by will or creditors to the heir.

We revel in Great Enquests, Setting Quests, Moars, and Sergeants ; we know all about delph and quarries of flag, slate, and stone ; and suit of Court, Baron Courts, Commons and Turbaries, Castle Service, the Staff, Mulcture and Token, Bond and Security, and a host of other strange sounding titles, convey as familiar a meaning to us as that of the Knight of the Sorrowful Countenance.

This treatise has been learnedly annotated by Sir James Gell, and the pith of it has (although without acknowledgment) been compressed within the limits of a magazine article by the eminent man who now holds the post of Attorney-General.

III. *The Origin of the Tenure.*

But regarding the title of this chapter all these learned commentators are silent.

Perhaps it is as well for their reputations that they are. For there is nothing which produces such embittered personal conflicts, or severs friendship so irretrievably, as the ancient history of Mann.

The Fiscal Problem, the Education Act, or the War Office will reduce many well-meaning people to a state bordering on temporary insanity, whilst Chinese Labour often induces a species of

mental epilepsy very painful to witness. But these are nought to the strife which boils round the foundation of the diocese of Sodor and Mann, or the origin and ancient duties of the Keys—a strife that descends undiminished from father to son, and divides families in animosities as keen as those of the Montagues and Capulets.

I do not propose to entangle myself in these thorny thickets of prejudice and personal pot-boiling, but—having noticed that Deemster Parr describes the Manx Tenure as of the nature of Copyhold, Deemster Sherwood, Sir James Gell, and the present Attorney-General as leasehold growing into customary freehold, whilst other lay and semi-lay writers of great authority on legal questions are divided in opinion on the point, and may be classed in sections as allodialists, feudalists, communalists, and run-riggers—it may not be entirely a work of supererogation to recall to mind the salient characteristics of allodial and feudal, copyhold and customary, freehold respectively, before entering upon the immediate subject of our inquiry.

IV. *The Allodial System.*

Land owned by an allodialist—known as an *allodium*—is (in Blackstone's pithy definition) 'a man's own land which he possesseth merely in his own right without owing any rent or service to any superior. This is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*.'

What the prevailing system of land tenure in Europe was prior to the incursion of barbarous tribes which issued from the North in the fourth, fifth and sixth centuries after Christ, overran the continent, and overturned the Roman empire, is perhaps not certainly known, but there is reason to believe that a great part of it, at all events, was allodial, or of an allodial nature.

Something of a feudal character there may have been in the Roman empire, particularly in the case of those possessions given to the *duces limitanei* or dukes of frontiers in the empire. However that may be, we are left in no doubt as to the method of land settlement the Northern invaders followed, and out of which the feudal system eventually grew. Upon settling in the countries which they had subdued, the victorious tribesmen divided the conquered lands. Some were allotted to the king or chief of the conquering tribe, and the rest were either divided amongst those who had followed his standard, or left in the possession of their original conquered proprietors. Those allotted to the soldiery acquired the name of allodial, and were enjoyed as free and independent property. They were held of no one, and charged with no services.

And those lands which were left in the hands of the conquered owners appear to have acquired the same designation.

V. *The Feudal System.*

Of the conquered lands assigned to the sovereign of the tribe, certain portions were afterwards usually distributed by him amongst his adherents, chiefly his leading companions in arms. The interest they derived under these grants was not strictly in the nature of property, but of a usufructuary kind only, that is to say, that the grant was at first limited to the person of the individual on whom it was conferred, and he had to render certain services in return.

The interest thus granted was originally termed a benefice, but the holding itself afterwards acquired the designation of a fief or feud, and hence the derivation of the word 'feudal.'

The services the grantee was bound to render in return for the usufruct were commonly at first of a military character, such as the rallying round the standard of the chief for the purposes of foreign invasion or domestic defence, with an adequate body of armed retainers in due military equipment, and, in addition, involved the taking of the oath of fealty, the doing of homage to the superior lord, and the payment of fines or reliefs on death or alienation.

In return for this service, the lord bestowed on the tenant his patronage and protection; the essential principle of a fief being a mutual contract of support and fidelity.

There were, in addition, other peculiar and onerous conditions attaching to the species of holding known as feudal which it is unnecessary to enumerate.

VI. *The Destruction of Allodialism.*

The two systems did not long continue in existence together, for the allodialist, though enjoying a nominal independence, found himself exposed to all the evils and dangers attendant on a state of civil confusion, and contemplated with envy the comparative security of the feudal vassal, whose superior lord was bound to give him that shelter from oppression which the law was then too weak to afford.

The allodialist, therefore, was gradually induced to change the nature of his property from allodial to feudal, and effected this by surrendering his land to some powerful lord, and receiving it back again from him in the shape of a feud. Roughly speaking, it may

be said that the feudal system had become practically universal in England in 1086, and in Scotland some years earlier.

VII. *Copyhold and Customary Freehold.*

In course of time, from grants for life, feuds became extended to all the sons equally, and, at last, to the heir at law of the grantee.

Having acquired such a permanency of holding, the grantee began to imitate his superior lord by granting out portions of land by way of subinfeudation. The holders of such portions are what are now termed freeholders. Whilst so doing, the grantee generally reserved a portion as a site on which to erect his mansion with a portion of the surrounding lands as a necessary convenience. This was called his 'demesne,' and a portion of it would be retained in his personal occupation, and of the rest, part was turned over for cultivation (or rather left) to the class called villeins, and the remainder reserved as waste to afford common pasturage, turbary, and so forth to the lord and the villeins.

The story told by Blackstone and followed by most English text-writers till about twenty years ago, that the holdings of villein tenants were originally created by the will of the lords and depended on their sufferance, has been known for a longer time to be fictitious. As Sir Henry Maine said in 1883, 'it is certainly not true, and perhaps the least drawback on it is that it is not true¹.' But it is enough for the present purpose to say that, even according to the technical doctrine of the sixteenth-century lawyers, framed mainly in the interest of the lord, although villeins were in general said to hold their estates at the will of the lord, yet it was such a will as was agreeable to the custom of the manor, preserved and evidenced by the rolls of the several manor courts held by the lord in which they were entered. Having, however, nothing to show for their estates but these customs, and admissions in pursuance of them entered on these rolls (or the copies of such entries witnessed by the steward), they soon began to be called tenants by copy of court roll, and their tenure itself, a copyhold.

At the present day in England a manor, when in its proper and perfect state, also still comprises, in addition to the lands held as copyhold, according to its ancient constitution, some portion of freehold tenants holding of the manor in perpetuity.

With respect to the tenure known as customary freehold, it may be briefly stated that in some manors the holding was from the first so far of the nature of freehold that the grant was not

¹ Early Law and Custom, p. 301.

confined to the life of the tenant, but it was a grant in perpetuity upon the terms only of yielding the accustomed services. Such a tenant did not hold at the will of the lord, but only according to the custom of the manor, and his tenancy was called a 'customary freehold.'

But 'the books are very barren on this species of tenure¹,' and whilst admitting, for the purposes of this article, the conventional notion of customary freehold, I am not prepared to accept in its entirety the appositeness of the definition when it comes to be applied to the tenure of estates in this island.

VIII. *The Legend of Godred Crowan.*

Bearing in mind the foregoing general description of allodial ownership, of feudal tenure, of freehold, of copyhold, and of customary freehold according to English authorities, turn we now to our own island, and apply ourselves to the first of our inquiries, namely, whether the ownership was originally allodial or feudal.

Reference has already been made to the incursions of the Northmen into Europe and their process of land settling, and there does not appear to be any reason to suppose that that process was of a substantially different character in the case of the Isle of Mann. Indeed there is fair authority to the contrary, as we shall presently see.

Whether the Vikings had settled in the Isle of Mann prior to 870 A.D. is not very clear, but at all events it seems to be the better opinion that in that year King Harold Harfager (or Fair Hair), of Norway, in the course of a great expedition, conquered this island, and that it was from the date of this conquest, that the late Norwegian kings derived, or at all events asserted, their right and title to Mann and the Isles.

Passing over the intermediate rulers of Mann, whether they derived their authority from Norway or from Dublin, we alight upon one Godred son of Harold, a powerful and warlike person, who in or about the year 979 A.D., amongst other exploits, conquered Anglesey. This personage's historical existence as king of the Western Isles is undoubted, but it is open to question whether the historians are correct in ascribing to him the lordship of Mann, since it is certain that we do not hear of Mann and the Isles being united in one kingdom till the invasion of King Magnus of Norway in 1098. However this may be, we know that the reign of MacHarold soon came to an end, and he is said to have been succeeded in the kingship of Mann by Sigurd, Earl of Orkney and Caithness, who was

¹ See *Mertens v. Hill* [1901] 1 Ch. 842, deciding that in socage tenements of a manor of ancient demesne the freehold is in the tenant.—F. P.

certainly tributary to Earl Haco, the ruler of Norway, and paid an annual tribute to him.

Earl Sigurd fell in the great battle of Clontarff against the celebrated Brian Boroimhe in 1014, and his son Thorfinn seems to have come into possession of Mann. Thorfinn was kinsman to the notorious usurper Macbeth, the story of whose ambition, treachery, and death has inspired the greatest of all dramatists with one of the greatest of dramas.

Finally in the year 1079 or 1080 appears the redoubtable Godred Crowan (said to have been a fugitive from the battle of Stamford Bridge), who lands in Mann with a number of followers, and, after two defeats at the hands of the Manxmen headed apparently by their king Fingall, the son of Godred the son of Sytric, returns a third time, completely routs the islanders at the battle of Sky Hill, and seizes their island.

IX. *The Conquest.*

The Monk of Rushen Abbey who compiled the '*Chronica regum Manniae et Insularum et episcoporum et quorundam regum Angliae, Scotiae, Norwegiae,*' after a dramatic description of the battle, concludes the entry with the following significant words:—

'Next day Godred gave his army the option of having the country divided amongst them if they preferred to remain and inhabit it, or of taking everything it contained worth having, and returning to their homes. The soldiers preferred plundering the whole island, and returning home enriched by its wealth. Godred then granted to the few islanders who had remained with him, the southern part of the island, and to the surviving Manxmen the northern portion, on condition that none of them should ever presume to claim any of the land by hereditary right. Hence it arises that up to the present day the whole island belongs to the king alone, and that all its revenues are his.'

Before commenting on this statement, I will take leave to pass over all the intervening history of the island and of its royal line, and quote from the answers of the Deemsters and the twenty-four given at Castle Rushen to Sir John Stanley II, king of Mann in the year 1422.

'28. Alsoe we give for Law, that there were never xxijj Keys in Certainty since they were first that were called Taxiaxi, those were xxijj free Houlders viz.: viij in the Out Isles, and xvj in your Land of Mann, and that was in King Orrey's days. . . .'

At a Court of all the Tennants and Commons of Mann held in the same year, the Bishop of Mann was called

'to come to doe his Faith and Fealtie unto the Lord, as the Law asketh, and to shew by what Claime he houldeth his Lands and

Tenements within the Lordship of Mann, the which came and did his Faith and Fealtie to the Lord. The Abbott alsoe of Rushen, and Priors of Douglas, were called to doe their Fealtie, and to shew their claimes of their Houldings, Land, and Tenements, within the Lordship of Mann; the which came and did their Fealtie to the Lord. The Prior of Withorne, in Galloway, the Abbott of Furnace, the Abbott of Bangor, the Abbott of Saball, and the Prior of St. Beade, in Copeland, were called in and came not; therefore they were deemed by the Deemsters, that they should come in their proper Persons within xl days, and if they came not, then to loose all their Temporalties, to be ceised unto the Lords Hands in the same Court.'

I quote from the imperfect copy in the Rolls office here [made late in the sixteenth century] of the Declaration and Ordinance in question, the original having been removed and tampered with by the over-zealous servants of the Lord of the Island.

X. *The Freeholders.*

We have now arrived at a very interesting stage of our inquiry, and we might profitably pause to consider these remarkable and significant statements.

That the first was actually made by the chronicler writing in or about the year 1276 is beyond all doubt.

The next inquiry is whether it be true.

Our excellent monk's work has been subjected to a minute and prolonged investigation at the hands of very eminent critics, but it may, I think, be asserted that, on the whole, he has come very well out of the ordeal.

Most of his facts are accepted to be as correct as in an historian of those days—and a clergyman to boot—can reasonably be expected.

Nevertheless, the paragraph above quoted has been fallen foul of by no less an authority than Professor Munch, the eminent historian of Norway, who edited the chronicle in question.

The Professor thinks the whole story is an anachronism, and that tradition assigned to Godred Crowan what belonged to a Godred of much earlier times. The tale of the exclusion of the hereditary rights of the islanders is almost exactly the same as that told of Harold Harfager the conqueror of Norway, who is said to have appropriated to himself all Udal (or hereditary) lands, so that thenceforth the possessors of such lands had them only in farm or fief from the king. Something like it is also told of the Earl of Orkney, and the same legend existed all over the Germanic world. It is more likely (the Professor thinks) that, as the conquest of Mann

by the Norwegians probably happened in the ninth century, the acquisition of the property in the soil by the conqueror took place then, and not in Godred Crowan's day. Putting aside the interesting questions which arise on this statement, and the speculation that the Godred Crowan [as mixed up with Godred MacHarold and with the Norwegian conqueror of Mann, whoever he was] is the personage the twenty-four meant to refer to when they spoke of our old friend King Orry—he of the 'Milky Way' and other interesting tarry-tiddles—Professor Munch's opinion seems to justify us in two or three conjectures.

XI. *We Conjecture*

That the ownership of lands in Mann prior to the Norwegian conquest was of an allodial nature, in that the inhabitants had them in hereditary right and not from the king or chief paramount. And further, that at or after that conquest the conqueror, temporarily at all events, affected to destroy this right and to appropriate to himself all the hereditary lands, in like manner as he of the Fair Hair did in Norway, and as the northern invaders of part of Europe displaced the original allodial by what afterwards grew to be feudal tenure. It is also a matter of fair conjecture that the southern part of the island, which is said to have been granted to the islanders (i. e. the Norwegians of the out isles) who accompanied the conqueror—his companions in arms—was henceforth held by them in fief or as feuds. Does it follow as a logical sequence that the northern portion was granted to the Manxmen on the same tenure, or was it rather considered part of the king's demesne to be held by them as tenants at will like unto villeins or copyholders?

But here I pause, aghast at the quagmire into which I have unconsciously walked.

Starting out with the best intentions, declaring my determination not to fall into conjecture on a vexed subject, I suddenly find myself, like Christian of the allegory, struggling in a Slough of Despond at the very outset.

Already the fiery cross is alight, and the summons is on the lintel of every dabbler in Manx history to arise and slay this impertinent theorizer who dares to throw doubt upon the ancient rights of the freeborn and freeholding Manxmen.

And I am painfully conscious that, if I talked with the tongues of men and angels, I could not deprecate the Manxman's natural horror at the mere suggestion of a theory so humiliating to his ancestry, and can imagine him immediately preparing, like the amiable Lord Macaulay, 'to dust the varlet's jacket for him.'

By way of deprecating the first burst of indignation, let me hasten to state that I do not believe that the Norwegian conqueror reduced the northern Manxmen to the condition of serfs or villeins, for the very good reason that those warlike islanders were not of a temper to submit to anything of the kind.

For in 1098, barely fifteen years after Godred's alleged grants, the Northerners under Macmaras rose against, and totally defeated the Southerners led by Earl Other, at the battle of Santwat.

And at various other dates during the 200 years of the reign of the house of Crowan, the inhabitants and chiefs of Mann exercised a powerful influence in state affairs, sometimes electing the king, and sometimes deposing him if he proved to be unsatisfactory: facts from which it is impossible to suppose that the Manxmen of those days occupied the position, or anything like the position, of villeins or serfs.

That the chiefs, at all events, were possessed of lands of inheritance, we know from the fact that in 1144 King Godred II 'coepit tyrannidem exercere contra principes suos nam quosdam eorum exhaereditavit.'

Whilst the hereditary right of the people in their lands had become (or remained) so sufficiently firmly established in the year 1266, as to be expressly referred to and provided for in the treaty signed at Perth in that year between Haco of Norway and Alexander II of Scotland, by which Mann and the Isles were ceded to the Scotch king.

'Nor are they (i.e. the inhabitants of the said island) to be pursued in their inheritances in those islands, but to continue in the peaceful enjoyment of the same under the dominion of the Lord King of Scotland.'

XII. *Peculiarities of Udal Tenure.*

Moreover the Norwegian feudal system (if such it can be called) differed considerably from the highly elaborated system introduced by the Normans into England.

It is true that Harold Fairhair, when he established his kingdom, appropriated to himself not only all the commons, till then held in common by the Herad or tribe, but also the Odal or Udal lands of the hereditary proprietors, and it was that precedent William the Conqueror considered himself to be following, when he claimed the whole of the lands of England as his by conquest.

But Harold and his successors never succeeded in enforcing this right in its full rigour in Norway as the Conqueror did in England. The Norwegian Udal lands remained substantially so for a long

time, and many estates in that country have continued to this day to present the ordinary incidents of that tenure.

Now what were those incidents?

For the purposes of the present inquiry it will be sufficient to note the following:—

(a) That such land was inalienable, and if sold to any one outside the family, the latter had a right of redemption at a price one-fifth less than the appraised value, if they or one of them gave public notice of a claim within twenty years to the Thing, and this right to redeem did not become forfeited till after the expiration of sixty years' undisputed possession in the new owner without notice of any claim given.

(b) That the sons, and later the daughters, all succeeded to the inheritance on the death of the owner.

(c) That land became Odal, amongst other ways:—

(1) when three generations had owned it in unbroken succession, and it fell to the fourth (as inheritance),

(2) when it had been got by *bronderfyd*, i. e. when the purchaser received the grantor to keep him in bad and good circumstances and feed him 'until fire and pyre' (until he died). In this case of course the land must have been Odal in the grantor's hands.

XIII. *Peculiarities of Manx Customary Law.*

Now there were several peculiarities in the Manx customary law as to land (before it was altered by statute), which must always strike one accustomed only to the English law as distinctly novel. For the present purpose, I will only mention the following:—

(a) That lands of the description of quarterland of descent, in addition to their non-liability to the debts of the proprietor, and their non-devisability by will, were inalienable without the licence of the lord (or the lord's officers).

(b) That intacks, or those portions of the commons licensed to be enclosed by a proprietor, did not become inheritance land (so as to fall to the heir and be non-liaible to debts and non-devisable by will), till they had passed three descents not reckoning the first purchaser. Till then, they were considered as mere chattels, liable to the owner's debts and devisable by his will, and were distributable as such amongst the next of kin on the death intestate of the owner.

(c) That lands acquired by *bargane-eirey* (the Manx expression for the customary settlement by an ancestor on his heir presumptive or apparent) were considered lands of inheritance

in the purchaser, whereas bought quarterlands were mere chattels alike to intacks before they had passed three descents.

- (d) That by the Statute of 1662, which declared that for the future bought quarterlands should be considered to be lands of inheritance and descend to the heir, it was provided and reserved that such lands should be subject in the hands of the heir to a charge equal to the value thereof in favour of the next of kin.
- (e) That it was an ancient custom continued up to recent times (and not dependent upon the Statutes of Limitations, save so far as regards the necessity of its being put in writing), that any person claiming title to lands in the island might stop the time limit running against him by simply entering a claim at any sitting of the court within twenty or twenty-one years of his dispossession without notice to the adverse party, the claimant praying that his claim might be received and entered on record *according to law and ancient custom*.
- and (f) That the earliest method of transfer of which we have any written record, was for the tenant of lands who had surrendered them into the lord's hands, or had alienated them to any other person, to come into the Baron Court in the presence of the lord's officers and of the Enquest 'and make resignation thereof by delivery of a straw, and thereupon a record was to be entered of the same which was all the assurance the succeeding tenant had of the said estate in the nature of a copyhold, which was held sufficient evidence of his holding without any writing script' (Parr's Abstract of the Laws of the Isle of Mann).

XIV. *They are Compared.*

These peculiarities of Manx customary laws are of undoubted antiquity, inasmuch as we find no statutory authority for any of them save for that adopted by the Statute of 1662.

When contrasted with the peculiar incidents of Udal tenure in Norway to which reference has already been made, there is to be detected, I think, a striking resemblance.

Compare the distinctive elements of Udal land, its inalienability as against the kindred, the right to redeem within sixty years (equivalent no doubt to three descents), provided notice had been publicly given in the Thing—with the inalienability of quarterlands of descent either by will or for debts, except in the lifetime of the proprietor with the licence of the Baron Court, and originally

no doubt in its presence by the delivery of a straw. Compare the fact that the Udal lands were limited and not extendible, and that all other lands which lay outside this class were free from its cumbrous safeguards—with the fact that the quarterlands (which have existed in their present number and within their respective boundaries from time immemorial) were also limited and not extendible, and that the intack land which lay outside their boundaries was not subject to the distinctive safeguards of the quarterland.

Compare the elaborate nature of those safeguards according to the Norwegian law, under which land had to descend through four generations in unbroken succession before it could become Udal, but if Udal already, an alienation by *bronderfyd* did not destroy its character as such—with the fact that intack lands could not become inheritance land akin to quarterland of descent till they had passed three descents not counting the first purchaser (i.e. four generations), and that alienation by *barganè-eirey* did not, whilst any other alienation did, destroy the inheritance nature of a quarterland.

Consider with these the curious provision of the Manx Statute of 1662 which created bought quarterlands lands of inheritance, reserving a charge on them equal to their value in favour of the next of kin, and the still more curious and significant ancient custom of preserving a claim to land by publicly making a claim to it within twenty years at any sitting of the Baron Courts without notice to the adverse possessor,—and it will be seen, I venture to think, that all the indications point to a much closer connexion between the customary land law of Mann and the laws governing the Udal tenure in Norway, than to anything to be found in the laws of land tenure in England, Ireland, Wales, or Scotland.

XV. *We Plunge into Antiquity.*

By this time our imaginary antagonists will have no doubt recovered themselves from their sheer wonderment at our audacity, and can be imagined clamouring together, but in many tongues, 'What absurdity this is, based on no authority! What of the statutes and ordinances of the Isle of Mann commencing in 1417, continued to the present day, the only direct and unimpeachable authority from which can be gathered accurate information?'

As I do not consider these so-called statutes and ordinances as of the slightest direct authority upon the business in hand, I do not propose to be drawn off the present inquiry by referring to them, though I shall have something to say about them later on, but I will proceed to build up the Udal theory.

And firstly, let me deal with the apparently vital distinction between the non-alienability of the Norwegian Udal lands as

against the next of kin, and the alienability of the farm lands as against every one but the lord.

To do this it is necessary to go back a little into the ancient history of land tenure.

In Rome the land was anciently the property of the *pater familias*, or head of the family. He belonged to a *gens*, or fictitious extension of the family, consisting of all Roman patrician citizens who bore the same name, and who on that account were supposed to be descended from a common ancestor. The *gens* was the constituent unit of the Roman state, and the *comitia curiata* was exclusively composed of representatives of such *gentiles*. Now testaments, by which a *pater familias* affected to dispose of his land, were all originally executed in the *comitia curiata* when assembled for private business. The reason of this is to be found in the old Roman law of intestate succession, under which first the *sui*, or direct descendants, succeeded, next the nearest *agnati*, and lastly the inheritance devolved on the *gentiles* or collective members of the dead man's *gens*.

A testament therefore could only be made when the testator either had no discoverable *gentiles*, or when they waived their claims; and every testament was submitted to the *comitia* in order that the *gens* who might consider themselves aggrieved (as prospective next of kin) by its dispositions, might put their veto upon it if they pleased, or by allowing it to pass might be presumed to have renounced their reversion.

This restriction on devisability applied only to *res mancipi*, or things transferable by the ancient custom of mancipation. The *res mancipi* were fixed and non-extendible, and all kinds of property which lay outside the limits of this peculiar class were alienable and devisable without the consent of the *comitia*¹.

Amongst the Germanic tribes the allodial property, sometimes inalienable altogether, was commonly transferable with the greatest difficulty, and only by actual tradition in the presence of a large number of persons.

Although reserved to the kindred, no doubt on failure of heirs the property would revert (as in Rome) to the *gens* or tribe of which the dead man was a member.

The allodial property was strictly limited, and all classes of property which lay outside that species were free from these cumbersome formalities of transfer and descent.

Passing to the Norwegian Udal property, we have seen that this belonged to the class of allodial property which was absolutely inalienable as against the kindred; but at the same time we have

¹ For details and some variant opinions see Girard, *Manuel élémentaire de droit romain*, 3rd ed., pp. 792 sqq.—F. P.

observed that, if Udal land had been alienated, it could not be redeemed by the kinsman without payment of four-fifths of the purchase-money,—or the full amount if he had neglected to give notice of his claim within twenty years,—and that it became absolutely vested in the purchaser if sixty years passed by without notice of claim given.

This notice had to be publicly given by the claimant at the Thing under whose jurisdiction the land lay.

Though extremely difficult, it will be seen that it was by no means impossible to alienate Udal land provided the next of kin did not interpose—as they might not do, if they had not the necessary funds¹. The necessity for the notice in the Thing, or assembly of the tribe, is significant, and it is not entirely outside the bounds of argument that its necessity originally arose from some right in the Thing, as representing the tribe, to be the ultimate next of kin, as in the case of the *comitia curiata*. The period of sixty years represents, no doubt, the three descents or four generations requisite to create the Udal which was strictly limited and non-extendible. Besides the Udal there was common land and ‘kauf land,’ which latter was freehold, and could be alienated at pleasure like movables.

XVI. *We Argue on Alienation.*

On my former hypothesis that the quarterland was originally Udal, the question next arises, how and when it became alienable as against the next of kin, and how and when descendible to the heir as against the next of kin? To these queries no reply can be returned, but certain suggestions can be made in the light of a few known facts. The right of unfettered alienation was claimed by the Manx even in the time of the Stanleys. So much we learn from the Ordinance of the Deputy Lieutenant and Council made in the year 1582, who complain in section 6

‘6 Itm. Whereas diverse and sundry the Inhabitants of this Isle, contrary to a good and laudable order, and diverse and sundrie general Restraints made, not regarding their duty, have, and daily do, notwithstanding the said Restrainte, buy, sell, give, grant, chap, and exchange their Farmes, Lands, Tenements, Cottages, Milns, Intackes, and other Landes whatsoever in their Holdings, at their Liberties and Pleasures, without the especial Lycence of the Lord or his Councell of the said Isle . . . making,’ (as they indignantly exclaim) ‘as it were, common Merchandize of his said Lands, *being but Tennants thereunto* . . .’

Putting aside for the moment the validity or otherwise of the

¹ ‘Will a man sell his odal land? Then shall he summon all the odal born (his kindred) and notify to them that he is to sell such odal land, making them the first offer, if they will buy, and have no impediment such as the want of money, and the like. . .’ (Norwegian Law Book.) And see note at end of this article. But in the island the prevailing modern opinion has been otherwise.

feudal claim of the lords to be absolute owners of the land, and the inhabitants to be only their tenants, there is no doubt that the Manxmen never at any time succeeded in dispensing with the consent of the lord or his officers to alienations of their lands.

This consent was exercised in the sitting of the Baron Court, in which originally the lord or his governor and officers all sat. In early times this court was held after the general meeting or assembly still known as Tynwald. The Court Baron was no doubt first established when the feudal system was introduced, and at such Court Baron all the landholders of the district were bound to attend; the Deemsters and twenty-four were there, and also the Great and Sett Enquests.

This court then took the place—we may well suppose—of the ancient judicial functions of the Thing, exercised, as they were wont to be, after the public business had been disposed of, even as was the case with the *comitia curiata*.

If this be so, then it will be seen that the obtaining of the licence of the lord to the alienation of land, and the right to alienate with such consent in the manner accustomed under the later feudal lords, is not inconsistent with a still more ancient custom of coming into the Thing and obtaining its consent as the *ultimus hæres* to such alienation where there were no discoverable next of kin.

Again the right (made by 'ancient law and custom'), on the part of any person wrongfully dispossessed of land, to stay the time running against him by publicly entering a claim at any sitting of the court (on our supposition originally the Thing) within twenty or twenty-one years, whilst it bears no resemblance to anything known to English law, has the strongest resemblance to the method of public notice of claim in the Norwegian Thing, by which the aggrieved next of kin prevented his claim, to repurchase Udal lands wrongfully alienated, from being forfeited by lapse of time.

True it is that this ancient Manx right, as we first hear of it, extended to the case of all lands whether inheritance lands or otherwise, and was certainly not confined to the next of kin, but it is not outrageous to suppose that it had its origin in the manner suggested, since no other origin has ever been suggested for it.

There remains the distinction between the Udal descendibility to the next of kin, as distinct from the Manx descent to the heir at law only, but this is a distinction of little importance, inasmuch as we cannot tell what the Manx law of descent was till comparatively late times, and a change of this sort is often to be observed in other systems of land law.

Even in India, where the rights of the family are still in full force, a tendency to prefer the heir wherever possible is to be detected, and

in the feudal system the same change has already been referred to as having gradually taken place.

Moreover, the Statute of 1662 seems to indicate a distinct throw-back to the original rights of the next of kin, which indeed always did exist in the case of lands other than descended quarterlands, by analogy no doubt to the ancient law of descent.

The change which took place as to the quarterlands of descent is always to be attributed to the inalienability of the land, its frequent connexion with some dignity or honour, and the extreme inconvenience of subdividing it amongst an ever increasing number of persons as co-heirs.

XVII. *Intacks of Three Descents and Bargane-eirey.*

Assuming then that the first difficulty propounded is not insuperable on the hypothesis put forward, we are on much firmer ground when dealing with the next suggested similarity between the Norwegian and Manx customary law.

That a distinction between descended and acquired lands as to alienability by deed or will is common to many systems of tenure, I grant, but not so the peculiar rule that intacks could not become inheritance land, till after they had passed three descents, not counting the first encloser.

This is surely assignable to a Udal origin, and demonstrates not only the distinction originally existing between the ancient farm lands (whose exact boundaries have existed unchanged from time immemorial, and have never been and are not now extendible) and the common land, which by licence of the lord (and possibly originally of the tribe) became the subject of private ownership,—but also the extraordinary safeguards by which the sanctity of the inheritance land was surrounded.

And once inheritance land, always inheritance land.

For, although the laws of later days, straining, as they always tended to do, against inalienability, turned quarterlands or intacks of ease or of three descents in the hands of a purchaser for value into chattels devisable at will and liable to be sold for debts, in every such case after they had again passed one descent from the purchaser, the lands regained their former designation and sanctity, and the heir could defy alike the will or the creditors of the deceased proprietor.

Adverting to the third peculiarity of our laws, it will be remembered that I ventured to compare the fact that Manx inheritance land acquired by *bargane-eirey* remained inheritance land in the hand of the purchaser, with the fact that Norwegian Udal land remained Udal in the hands of a purchaser by *bronderfyd*, i. e. where the latter covenanted to keep the grantor and feed him till his death.

The resemblance is somewhat obscure until the circumstance is considered that, although it was not, in later times at least, a necessary ingredient of a *bargane-cirey* that the heir should keep and feed till his death the ancestor who settled the estate on him, yet it was a common provision of such deeds that it should be so. To this day the custom is often observed, and is generally, if not always, a matter of contract between the heir and his aged parent, or grandparent as the case may be.

Sometimes in the *bargane-cirey* a life estate was expressly reserved to the grantor, and sometimes an annuity to him was provided for, but the fact that these circumstances did not, as an actual purchase for value by an heir did, alter the peculiar characteristic of a *bargane-cirey* seems to point to this reservation or payment being merely a modern (and more convenient) substitute for the original covenant to provide the settlor in lodging and food till he died.

XVIII. *Symbolic Investiture.*

And lastly, the method in vogue in Deemster Parr's day, of carrying out a sale by the formality of attending the Court Baron, and making resignation of the estate by delivery of a straw, 'which was all the assurance the succeeding tenant had of the estate, and was held sufficient evidence of his holding without any writing script,' seems certainly to point to an earlier custom of alienating the land by tradition in the presence of witnesses, and those witnesses the neighbouring landowners assembled in the Thing itself.

No doubt the custom resembles [and so it seems to have occurred to Parr] the process of alienating copyhold estates, but the traditional notion that the *tenure of the straw* was the ancient land right, coupled with the following similarities in the customary law of Orkney and Shetland, has a significance not to be lightly passed over¹.

XIX. *The Orkney Tenure.*

Prior to the year 1266 Orkney and Mann were both under the sway of the kings of Norway.

In that year Mann was ceded to Scotland, and it may be interesting to note by the way that, in the treaty by which it was so ceded, Mann was placed under the laws of Scotland, and it was stipulated that from thenceforth it was to be ruled by such laws.

¹ Symbolic delivery is in no way peculiar to copyholds in English law, and, where it occurs, is either survival or early imitation of a much more extensive archaic usage. Cp. Blackstone, Comm. ii. 312, 315, and see much fuller and more various examples in Du Cange *s. v. Investitura*. As late as the Restoration the Duke of York's Commissioners gave William Penn 'possession and submission' of certain lands in Pennsylvania 'by turf and twig and water,' as he stated in a letter to the Board of Trade now in the Record Office. It seems that the necessity for delivery of a deed in the Common Law may be due to the deed itself having been regarded at one time as a symbol.—F. P.

Orkney remained under Norwegian rule till 1468, when it was impignorated to the Scotch king as security for the dowry of Margaret, the daughter of the king of Norway and bride of James III of Scotland.

In the marriage treaty of 1468 it was stipulated that the laws and customs of Norway should be continued in Orkney till it was redeemed.

It never was redeemed, and by lapse of time became incorporated in the dominion of the Scotch king.

The Udal system of land tenure was in sway in Orkney when it was impignorated, and, protected by the treaty stipulation and acts of the Scottish Parliament, has continued, to some extent, in force to this day.

The circumstances attending the alienation of the Orkney lands, and their distribution on descent, are quaintly referred to in the following opinion given by the Bishop of Orkney in 1642, in answer to demand made of him what the lands 'haldin in Udill' are :—

'*Ratio nominis*, also far as ever I could trye is, that the kings of Norroway sent one UDILLAUS, wha divyded the londs of orknay and Shetlond in pennie londs and used londs, as Ireland is now divyded in aikers : from yat divisione to this day they have possessit yoir londs as heritors without wreate. They sell yoir londs ; utheris buyes yame at also dear a rate as any lond in Scotland. Thir londs be the law of Norroway, were equallie divyded among the children, be ane inquest founded upon a warraund of the superior. . . . Their holding, I think, be like the copiehold of Ingland. . . .'

How far the good bishop was correct in his history of the word Udal it would be sacrilegious to question, but he would no doubt be well acquainted with the actual incidents of the holdings of his day. Erskine, in dealing with the proper form of investiture in Scotland, says :—

'Traces of the old proper investiture . . . are preserved where the practise is retained of giving possession on the ground of the lands by the symbol of a stone, a staff, or a bundle of grass, without any writing, in the presence of the neighbouring inhabitants, who were assumed to fill up the place of the *pares curiae* (i. e. the Lord's vassals attending him in his Baron Court). The Udal right of the Stewartry of Orkney and Shetland is of the same nature.'

XX. *The Orkney and Manx Tenures are compared.*

Here we have an example of Udal land which had become freely alienable in the seventeenth century, though no doubt originally inalienable as against the kindred.

But note the traditionary account of the division into penny lands (or lands within the dykes) and used lands (or lands without the dykes), which, when enclosed, became known and distinguishable as 'outbreaks.'

This is very suggestive of the division existing between farm lands and intacks, and it is to be noted that s. 47 of the Declaration of 1442 provides for the delivery to every man of his *pennyworth*, the meaning of which is not otherwise clear. Note also that the men of Orkney were heritors without writ, and alienated by delivering a bundle of grass in the presence of the neighbouring inhabitants who filled the place of *pares curiae*, and reminded the jurists of 1642 of copyholders, though nothing is more certain than that they were originally nothing of the kind.

This is again very suggestive of the process of alienation described by Parr, writing shortly afterwards, and also reminded him of copyholders, as no doubt his employer (the Earl of Derby) would be very glad to hear.

A third time, note that on the death of a proprietor the lands were by the law of Norway divided amongst the children by an inquest founded on the warrant of a superior.

This is exactly what was suggested to have been originally the case in Mann before the eldest son's rights developed, and is very suggestive moreover as to the origin of the Sett Enquest and its ancient duties, whilst the process of division of land by the Enquest amongst the kindred is more than hinted at in s. 15 of the declaration of 1577.

XXI. *The Statutes and Ordinances.*

But, like the dying Socrates, I owe a cock to Asclepius, and must on no account omit to pay it.

In other words, I must redeem my promise to our imaginary assailants, and make a reference of sorts to the Statutes and Ordinances of the Isle of Mann.

In the century and a half of turmoil and confusion that followed upon the extinction of the royal line of Mann, and the fierce strife between the English and Scottish kings over the ownership of this unfortunate island, its ancient constitution, its landed rights, and even its very customary laws, seem to have been thrown into the melting-pot, and to have been largely forgotten by, or fallen into desuetude amongst the inhabitants.

The land—at one time (according to Henry of Huntingdon) 'from its fortunate fertility most productive of corn'—devastated by successive invasions, seems to have gone out of cultivation, the fences to have become obliterated, and the inhabitants—a prey to the

rapacity of succeeding lords and bailiffs—to have gradually abandoned their farms, and taken themselves to eking out a precarious existence by pasturing flocks of cattle and sheep on what had apparently become a treeless boggy wilderness, overgrown with gorse and rank grass.

So much is to be gathered from a perusal of what are termed the Statutes and Ordinances of the Isle of Mann under date 1417, 1419, 1422, and 1577, of such ancient maps and charts as are extant, and from the evidence of the eyesight when the age of the existing timber of this island is examined.

The astonishing ignorance of the people in 1417 on the subject of their constitution, their land rights, and their laws, I deduce from the answers of the Deemsters and the twenty-four given in that year and in 1419 to certain questions, no doubt propounded to them by the lord proprietor himself.

Such a strange concatenation of vague tradition, of confusion of thought, and of ignorance of law terms, would indeed be astonishing in any legal assembly.

A sort of hurly-burly of barons in the third degree, of beneficed men, deemsters, officers, clerks, knights, esquires, yeomen, and worthiest men, are introduced into the answer, though what the distinction between barons and beneficed men, or of yeomen and commons, might be, or why some of them were in the third degree any more than in the second or fourth, and why the commons were to be called upon to 'show their charters how they hold of you,' without any explanation of the sudden creation of charters they had not got and never had had, are problems that would dumbfounder a Philadelphia lawyer. This is followed by a reference to squatting on the commons, and to 'tenants julaynes,' so obscurely worded, that its meaning was never understood till it was cleared up by a statute of 1645.

Later on comes a reference to Taxiaki, without explanation of who they were, or why so called, a confounding of them with the Keys and freeholders, and vague talk of 'King Orrey's days,' without any explanation of what the connexion between Keys and taxiaki might be, or whether there were any Keys in those days, or who King Orry was, or whether he ever existed, and if so when and where; talk of written laws in Orry's days and the time of Michael Blundell, without any explanation of what those laws were, where to be found or how lost, when and where Michael Blundell lived, and what he was.

These and numerous other instances demonstrate that the degenerate successors of the Taxiaki—worthiest men and deemsters as well as unworthy commons and yeomen—were in abject igno-

rance of the most elementary details of their kings, their constitution, their assemblies, and their laws.

The only plausible explanation of such ignorance is, indeed, the one given, namely, that there had never been any certainty (i. e. continuity of existence) in the twenty-four since the days—then quite traditionary—of Orry, of whom the only fact they appeared certain about was that he was a king.

XXII. *The Ruin of Mann.*

It would have been marvellously strange had it been otherwise, for fearful indeed had been the fate of the unfortunate Manxmen since the death on November 24, 1265, of Magnus, the last of the Norwegian kings of Mann.

Deprived of his strong arm and powerful influence, Mann was abandoned to its fate by King Haco of Norway in 1266 by the treaty of Perth, by the terms of which he absolutely ceded the island to Alexander III of Scotland on payment of 4,000 marks and a yearly rent of 100.

From that year to the year 1290 the unfortunate islanders groaned under the heavy hand of the grasping Scotchman.

The laws of Scotland, under the provisions of the treaty, were forced upon them at the point of the sword; the feudal system in its most Scotch, and therefore most grinding, form was introduced; and a succession of bailiffs, ruling with a heavy hand for the King, so racked the land with heavy exactions and injustice, that they drove the inhabitants into open rebellion. That rebellion was crushed in 1275, with a slaughter so prodigious in comparison to the population that it passed into a traditionary distich of woe.

At the same time the Scotch afforded little or no protection to the island from the plundering incursions of pirates and marauders, and its condition grew so grievous that in 1290 the oppressed and desperate islanders, assembling at Rushen Abbey, addressed a piteous appeal to the terrible 'Hammer of the Scots' (then in the flood-tide of his martial career), imploring him to take under his powerful protection their one time fertile and prosperous country, then 'desolate and full of wretchedness for want of protection and defence.'

Even in the stress of the business of two great realms, the stern, but just, Edward found time to respond to the appeal.

The wardship of the island was committed to Walter de Huntercombe and a commission of three justices dispatched to hear and adjudicate upon the complaints of the people.

Policy, however, determined the English king on restoring the island to Balliol, which was effected in 1292, and for one hundred and forty-three miserable years the wretched Manxmen were tossed

about from king to king and from lord to lord, conquered and reconquered, bought and sold, mortgaged and pledged, and no less than eighteen successive kings or lords proprietors wrung from the island the produce of its soil and trampled on its constitution, its laws, and the liberties of its people.

It was undoubtedly during this frightful period that the Udal tenure (modified as it had not improbably been by the Norwegian kings) became obliterated, and the land, partially abandoned by its original owners, lay open and uncultivated, desolate and wild, ready to be seized as his demesne by any lord proprietor sufficiently determined and able to enforce to its fullest extent the already partially operative feudal system, and to reduce the inhabitants to the legal position of serfs or villeins.

XXIII. *The Establishment of the Feudal Tenure.*

Such a man was at hand in the person of Sir John Stanley, to whom the Isle of Mann was granted in perpetuity by King Henry IV in the year 1406.

He and his son, Sir John Stanley the second, the ambitious, determined, and able founders of the Derby family, soon introduced order into the distracted kingdom, and placed upon a sure basis their assumed rights as lords of the manor.

The entries in the Manorial Rolls and the provisions in the early part of the Statute-book, prove beyond all possibility of doubt that the Stanleys had effectually seized unto their hands all the lands both common and enclosed in the whole island, save those of the eight freeholders, or Barons, already mentioned, and affected to grant them out again to the inhabitants as leaseholds by the year, in some cases for years, and in a very few for life.

The three following specimen entries in the Manorial Rolls for the years 1511 and 1515, the earliest which have descended to us, demonstrate the nature of the holding to be leasehold :—

A.D. 1511. *Parochia Sancti Trinitatis in Rushen.*

Fysh Garth. De Jenken, Martenson et Willmo Martenson pro duobus tenementis et uno quartron terrae dimiss: sibi et assignatis pro term: vijtm annorum hoc anno vj^{to} XXXI^a.

A.D. 1515. *Parochia Sancti Trinitatis (Lezayre).*

Particula. De Johanne McCurry (Curphey) et Gilcolme McCurry pro duobus tenementis et uno quartron terrae dimiss: sibi. XVII^a.

A.D. 1515. *Parochia de Jourby (Jurby).*

Firma Molendi. De Patricio McBrew pro molendino de Carlan (Carlane Mill) cum pistar: aquae ibidem per annum dimiss: sibi. XVI^a.

All the other entries are similar in form, except a few granting life estates, and they include, so far as is known, every quarterland, mill, cottage, and then existing intack in the whole island.

It may be noted by the way that this Roll is reminiscent of the Orkney rentals of 1497 to 1503, which present curious and almost startling resemblances to ours.

Without going into them in detail, it may be further noted that the circumstances of the establishment of these rentals by the earls and bishops of Orkney, as soon as that island fell under Scotch rule, with the indirect aim of eventually feudalizing the Udal lands in pursuance of the known policy of the laws of Scotland, are suggestive of a similarity in the circumstances of the original establishment of the Manx Manorial Roll, possibly under the provision of the treaty of 1266 already quoted.

The so-called Statutes and Ordinances of 1417, 1419, 1422, 1577, and 1582 afford abundant corroborative evidence of the uncertain nature of the inhabitants' rights (if any there remained) in their lands.

Without making extended quotations, on reference to ss. 2, 3, 4, 5, 6, 9, and 12 of the declaration of 1417; ss. 7, 47, 48, 98, and 99 of that of 1419; and ss. 15, 16, 17, 26, and 30 of that of 1577, we gather

- (a) that every one was bound to keep watch and ward throughout the land, and must be ready at the lord's calling, under the heaviest penalties;
- (b) that no one could leave the island without licence, whether he had paid his rent or not;
- (c) that no one could enclose or occupy the commons without paying the annual value thereof to the lord, and that all lands were liable to the payment of rent to the lord. [This rent, which was payable at the lord's castle in kind, has been computed to be approximately equal to the full rack-rent value of the land];
- (d) that every one (including an alien coming to live in Mann) was liable to be set by force in the lord's land by the Sett Enquest, who were responsible for the rent in case of failure on the part of the person so set to pay; and that every farmer's eldest son was liable to be taken from his father's farm and set by force in the holding of any tenant who became insolvent;
- (e) that the lord's deputy was to see that the land setting took place before midsummer, and the Sett Enquest to see that every one so set occupied and manured his land and remained on it, and paid his rent or gave sureties for its payment;

- (f) that the fences were down, and the boundaries of farms largely obliterated, frequent commands being laid on the tenants to restore them ;
- (g) that in 1422 the inhabitants set more store by their goods than their farms, and that it was a matter of frequent occurrence for tenants to fail to make sufficient profit to pay their rent ; and lastly
- (h) that all tenants paying 6*d.* rent must attend the Manorial Court for his district (or Sheading), under penalty of a fine.

In 1582 the lord's officers declare in so many words (as we have already seen) that the landholders were but tenants of the lord proprietor.

And Deemster Parr, writing in the latter end of the seventeenth century, in the passage already quoted, describes the tenure of his day as akin to copyhold.

XXIV. *The Growth of Customary Freehold and Creation of the Present Tenure.*

I have left myself but little space to describe the gradual enfranchisement of the Manx nation and the re-establishment of their rights in the land, although in a modified form, and under a different designation.

Notwithstanding the form of holding, the custom of the country, as recognized by the customary laws and decisions of the courts, eventually construed the tenure to be in effect an estate of inheritance descendible from ancestor to heir, and as such the estates were held from generation to generation, until at last the very form of holding by lease disappeared from the Manorial Rolls.

We have seen that precisely the same process established the rights of the copyholders in England, and there is no reason to suppose that it differed in this island.

About 1643, and subsequently, the tenants, in order to get rid of several customary burdens, such as the lord's right of preemption or being victualled at a certain low price, accepted leases from the then lord for terms differing in several respects from those usual in former times, and consented to pay double rents for the quarterlands.

After the practice of leasing had continued for some time, the lords of the island (it is said) began to dispute the permanency of the holdings.

The tenants protested ; the lords held firm ; the dispute grew more and more acrimonious, till Rebellion began to break out all over the island.

At length the lords gave way, and in 1704 an Act of Tynwald was

passed by which the estates of the landholders were settled and confirmed.

This Act, which was re-enacted and confirmed in 1777 after the revestment of the island in the Crown, is to this day considered the basis of the tenure of Manx estates, excepting the estates of the baronies before mentioned.

The legal writers lay it down that the tenure settled by the Act of 1704 is akin to that known as customary freehold in England.

That is to say, the Manx customary tenant (or owner) is entitled to an estate freehold in quantity, but not in quality, and to the complete enjoyment of the land subject only to the reservation of all royalties, mines, and minerals of every kind, quarries and delf of flag, slate, and stone, to the lord, and to the payment of the annual chief rent, of a small fixed fine on every alienation and descent, to the lord, and to certain other customary burdens. Of these latter, the only one worthy of notice is that of the office of Moarship, the duties of which are principally the collecting of the chief rents and fines of the parish, in which the lands lie, from the other customary tenants therein.

The tenant is also entitled to dig, raise, and dispose of stone and slate in his own lands for his own use or the improvement of his own and his neighbours' estates, but he cannot make merchandise of them unless licensed by the lord. He is also compelled to permit the licensee of the lord to quarry on his lands, and, if there be a quarry already opened, to permit other tenants to use it on payment of reasonable compensation for surface damage.

This burden, and the fact that all other materials (including gold, silver, copper, lead, tin, and so forth) in or under the tenant's land belong to the lord, and cannot be worked by the tenant save by licence from the lord, and on payment to the latter of a heavy royalty, constitute the main practical disabilities under which the owner of land in the Isle of Mann labours, as distinguished from his freehold brother in England. In practice, these are not found to discourage either Englishmen or Manxmen from investing their money in the purchase of land and houses in this island, and from lending money on them as freely as on freehold land in England.

Perhaps one explanation is to be found in the comparative simplicity and cheapness attending the transfer of land here.

All original deeds affecting real estate being registered in the Land Registry at Douglas, and ranking (broadly speaking) according to priority of registration, a great defect in the English system is avoided, and the cost of searching and verifying the title is proportionally reduced.

The freehold of the land being in the lord, and certain English

statutes—such as the Statute *De Donis*, which was the origin of the estates tail, and the Statute of Uses, which created the extraordinarily complicated limitations to uses—not affecting this island, conveying is both simpler than in England, and is free from many anomalous technicalities attending the real property law of that country. The system of mortgaging is simpler, foreclosure is unknown, and the mortgagee's remedies are both cheap and expeditious.

XXV. Conclusion.

A few words by way of conclusion.

I shall be blamed, no doubt, for daring to form an opinion upon a *quaestio vexata* which has been so discreetly ignored by the legal writers, and so variously interpreted by the talented laymen who have affected to grapple with it.

I care not. 'Certainly there be that delight in Giddinesse; And count it a Bondage to fix a belief'; but the present writer not one of them.

And I believe that the true origin of the Manx tenure is to be found neither in the feudal system nor in the village community, but in the pure Norwegian Udal, whilst I am equally certain that that tenure, already severely shaken by the Scots, became abrogated during the reign of the Stanleys, was for some time of a copyhold nature, and that the present land right has been created by the Statute of 1704, and is dependent on that and on that alone.

Whether it can now be properly called customary freehold, and described as akin to customary or conventional freehold as it exists in many parts of England, is a matter of very grave doubt, since it is difficult to see how a statutory tenure can properly be ascribed to custom, and it is certain that the incidents of that tenure are not in every respect identical with the customary or conventional freeholds as known to the English law. However that may be, it remains a matter of congratulation with all patriotic Manxmen that, in spite of oppression and tyranny, subtlety and device, their long struggle for the re-establishment of their original rights to the substantial ownership of their lands was crowned with complete success.

REGINALD D. FARRANT.

NOTE.—Since this paper was written, the writer has come upon the report of a case in the Manx Court Rolls which seems to throw much light upon the theory of the original Udal tenure in Mann. In 1717, one Quilleash applied to the Baron Court for confirmation of a sale of quarterland from one Bell, whereupon, as it is recited, 'the same was objected against by John Skillicorn ye next of kin'; and the Court decided that the sale to Quilleash should be rejected, and that 'Skillicorn should have the preference paying ye same money.' A Statute of the year 1645—carefully read—seems also to confirm this view of the ancient customary land right.

MARITIME SALVAGE.

FOR the purpose of this inquiry, Maritime Salvage may be sufficiently defined as a service, rendered to save maritime property at sea, of such a nature as to entitle him who renders it to remuneration which the Court of Admiralty will decree in his favour.

And the point to be elucidated is, how, in a Policy of Marine Insurance, the obligation to make good to the owner of the property salvaged what he has been called on to pay for this service, arises.

Writing in 1664 Sir Robert Wiseman says¹:—

'The Romans did so thoroughly see the necessity that lay upon men to perform mutual offices and kindnesses each to other that to encourage men the more to pay these reciprocal duties, so necessary to each others common being, the scope of their Laws tended to secure all men from sustaining any prejudice by being officious or active for the benefit of other men. If therefore in my friend's absence I expend money, or contract a debt upon myself to accommodate and improve his business, though I did it without his privity or knowledge, the Civil Law will see all that I have laid out shall be restored me, and will compel him to save me harmless, where either I have or can possibly suffer detriment for his sake. For "*sicut æquum est*" sayes Gaius, "*ipsum actus sui rationem reddere et eo nomine condemnari, quicquid vel non ut oportuit gessit, vel ex his negociis retinet; ita ex diverso justum est, si utiliter gessit, præstari ei, quicquid eo nomine vel abest ei, vel abfuturum est*"² . . . "*Iniquum est*" sayes Gaius, "*officium suum alicui esse damnosum*"³; it is unreasonable that a man for his courtesie and goodness should reap a prejudice. Upon the equity hereof is that proceeding in the Admiralty Court clearly justified, whereby if a Ship being set upon by Pyrats or by enemies, shall be rescued by another ship seasonably coming to her rescue; it charges the ship that is thus redeemed with salvage money to the other that did so endanger herself, to preserve her; that recompense being but in lieu of all damages thereby sustained, and for future encouragement to others to fight in the defence of those that they see assailed hereafter. Upon the same equity is it, that when a ship is in danger to be cast away through a raging tempest, if to lighten the ship

¹ The Law of Laws, or The excellency of the Civil Law, by Sir Robert Wiseman, Kt., Doctor of Civil Law. London, 1664, at p. 90.

² Digest, Lib. III, Tit. v, Lex ii, De negotiis gestis.

³ Ibid., Lib. XXIX, Tit. iii, Testamenta quemadmodum aperiantur, Lex vii. The text taken from an edition of the Pandects dated Lugdunum (Lyons), 1550, reads '*& sit iniquū, damnosum cuiquā esse officium suum.*' Mommsen's text, as corrected in his notes, reads '*et est iniquum damnosum cuique esse officium suum.*'

some of the heaviest goods belonging to others be thrown overboard and thereby the Ship and the rest of the goods comes (sic) safe home, the loss is made common and reparable by the whole.

"*Aequissimum enim est*" says Paulus, "*commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt ut merces suas salvas haberent*".¹

In 1787 Park published his *System of the Law of Marine Insurances*. Opening a chapter 'Of Salvage,' this learned commercial lawyer says:—'All maritime States, from the Rhodians down to the present time, have made certain regulations, fixing the rate of Salvage in some instances, and leaving it, in others, to depend upon particular circumstances'.²

For this he cites the *Jus Navale Rhodiorum*, Part III. cap. xlv, xlvi, xlvi.

These chapters are thus summarized in a few words by Pardessus:—'*Des récompenses sont accordées à ceux qui sauvent les objets naufragés selon l'importance des objets et l'étendue des dangers qu'ils ont courus*'.³

Could this code be shown to have reproduced the law of Rhodes, anticipating by more than 1,000 years the legislation of Justinian, the antiquity of the equity of reward to salvors would be established.

But proof of this to-day there is none⁴. The most that can reasonably be suggested is, that at the date—whatever it may be—of the appearance of these laws—known to have been in existence in the twelfth century⁵—such compensation was universal, and though finding no place in the Pandects, was by tradition accepted as part of the maritime law of the once powerful island of Rhodes.

Yet Pardessus did not doubt that the code was of considerable antiquity. With learning as profound as his industry was inexhaustible, the distinguished Frenchman examined and analysed every record to which for him access was possible, and concluded by awarding to some Mediterranean power in the ninth century A. D. the distinction of having originated these rules of Traffic on the Sea.

¹ Digest, Lib. XIV, Tit. ii, Lex ii, Ad legem Rhodiam de jactu.

² 7th ed. (Author's), 1817, p. 214. Park was raised to the Bench of Common Pleas, 1816; died 1838.

³ Collection de Lois Maritimes antérieures au XVIII^e siècle, Paris, 1828, vol. 1, p. 227. The Greek text with Latin translation is set out at pp. 256 and 257. Pardessus says at p. 220 that the date of this compilation is unknown: 'Nous n'avons pas de renseignements pour déterminer l'époque à laquelle chaque partie de la compilation a été rédigée; nous connoissons seulement le temps où la troisième étoit certainement existante . . . Nous savons qu'elle existoit au XIII^e siècle. . . M. Schoell (Histoire de la Littérature grecque, t. vii, p. 235) croit qu'elle a été rédigée au VI^e siècle mais il ne justifie point son opinion.'

⁴ 'Elles (les lois rhodiennes) ne sont point parvenues jusqu'à nous. Il suffit de parcourir les prétendues lois rhodiennes . . . pour être convaincu qu'elles sont apocryphes.' Emerigon, Traité des Assurances, 1783. Préf., 3^e éd., par Boulay-Paty, Rennes, 1827.

⁵ Pardessus (*supra*).

This Jus Navale was followed, in quick succession, by many others, of which among those appearing prior to 1200, there are three, which in importance and publicity have, by some, been thought to transcend their fellows.

These, with their approximate dates, are: Consolato del Mare, 1050; Constitutum usus Pisae, 1160; Les Rôles d'Oléron, 1200.

They are set out *in extenso* in the pages of Pardessus, where it will be seen that each system of law embodies rules and regulations in respect of salvage¹.

If then, including the four above referred to, it be true that 'all foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head'² (salvage), there is probability approximating to certainty, that such an obligation indissolubly attached to the *res* itself at risk must in the thirteenth century have been within the contemplation of the inventors of the system of insurance, and of the framers of their special form of contract for indemnifying an owner of property at sea.

Where in the policy is the expression of this obligation to be found? Conviction and consistency alike induce a course of reasoning which, set out in a recent number of this REVIEW, may briefly be epitomized as follows.

The earlier English policies expressed the subject-matter of their contract, in respect of the thing insured, by the single word 'Adventure.'

Later policies introduced a perils clause, setting out in detail all those risks which up to that time had been embraced by this word.

The clause includes the risk of 'Jettisons . . . and of all other perils.' These words impose upon the underwriter an obligation to contribute to general average as being of the same nature as contribution to jettison³.

Since 1815, when Lord Ellenborough in *Cow v. May*⁴ proclaimed the analogy between salvage and general average, the Courts have not infrequently used language accepting, without reserve, the principle involved in the dictum of this learned judge.

And this, perhaps, never more clearly than in *Briggs v. Merchant*

¹ Pardessus (*supra*). The sections *re* Salvage in the order in the text are to be found in vol. ii. 143, 253, and 338; vol. iv. 582; vol. i. 326, 346. With regard to 'Les Rôles d'Oléron' the author gives reasons for thinking that the enactment, p. 326, may be an early addition to the original compilation. These laws, antedating the invention of the mariner's compass (*circa* 1260) and the modern development of steam power, but faintly foreshadow the stupendous salvage operations of the present day, and are chiefly concerned with '*res quae inveniuntur in mari*' and '*res ab inimicis vel praedonibus marinis captas*.'

² The law of Merchant Ships and Seamen, Abbott, 1802, 5th ed., 1827 (Author's), p. 397.

³ L. Q. R. xxi. 155. 'Contribution to General Average' of which the present inquiry is the logical outcome, and with which it is to be read.

⁴ 4 M. & S. 152 at p. 159; 16 R. R. 422.

*Traders Association*¹ (1849), where Lord Denman, having previously cited the passage in *Cox v. May* above referred to, in the course of his judgment said:—'Contribution to salvage is in the nature of general average, it is subject to the same incidents, and is, in effect, the same.'

What, is the extent of the sameness of nature judicially acknowledged of salvage and general average, rules of the sea alike, and emanating—so thought at least one judge of the Court of Admiralty—from the same equity of the earlier laws of Imperial Rome?²

1. Though not contemporaneous, each is the creature of early maritime law³.

2. The object of each is the rescue of property at sea from impending destruction.

3. By danger, each is called into existence, and by loss of the property, or attainment of its safety, this existence is determined.

4. Contribution to each is assessed on the net arrived value of the property saved.

Now although as regards salvage,

'Undoubtedly, the principle is to assess the value of the property, as salvaged, at the place—whether port of destination or not—where, and at the time when, the salvage service terminates⁴: and further, though this value must in the event of subsequent damage before arrival at destination be materially affected, it is not less undoubtedly the practice to assimilate the rule of salvage to that of general average by law established, and to assess the value at the port of destination⁵.'

¹ 18 L. J. Q. B. 178 at p. 180; 13 Q. B. 174; 78 R. R. 347.

² Law of Laws (*supra*). Wiseman presided over the Admiralty Court, 1673–1685.

Although this conception is inconsistent with the opinion prevailing to-day as to the Rhodian origin of General Average, it is an interesting indication of the probable attitude of mind of a lawyer of repute towards a question of the kind submitted in the text. It is true that the author does not in express terms refer to general average; but the proposition here put forward is based on the theory that general average and jettison are *ejusdem generis*. See L. Q. R. (*supra*).

Gaius is thought to have written between the years 138 and 180 A.D., in the reigns of Antoninus Pius and Marcus Aurelius Antoninus ['about the time of the earlier Antonines,' Eoby].

³ If, to-day, this statement stand in need of confirmation, it will be found in *Lohre v. Atchison* (1879) 4 App. Cas. 755 at p. 760, where Lord Blackburn said: 'The liability of the article saved to contribute . . . to General Average and Salvage . . . is a consequence of the perils of the sea, first imposed, as regards General Average, by the Rhodian law many centuries before insurance was known at all, and, as regards salvage, by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of.'

⁴ Kennedy, Law of Civil Salvage, 1891, p. 188.

⁵ For the extreme effect of this rule where the salvage service has been succeeded by a total loss, see *infra*. It must not be supposed that the contributory values are in all cases the same. Where a salvage service has been followed by a general average sacrifice, this would not be so; because, for the purpose of salvage, all that has been saved is the property diminished in value by the amount of the sacrifice. While as regards general average this value is further reduced by the amount of the charge for salvage, but—on the principle in the text considered—with the value of the sacrifice restored to it. As regards salvage it would seem correct in

5. What has been sacrificed contributes equally, in proportion to its value, with what has been saved.

This requires amplification.

The underlying principle of general average contribution is well stated by Lowndes, who paraphrasing Arnould says:—

‘The contribution is to be so regulated as to make it in result immaterial to each, whose property shall in the first instance have been taken, whose money spent, or whose credit pledged for the safety of all¹.’ It is therefore a rule of general average that ‘the amount made good in respect of property sacrificed is brought in as contributing rateably with the property preserved: so that the former pays the same proportion of general average as the latter².’

If this were not so, he whose property had been sacrificed would be indemnified in full at the expense of his co-adventurers, in comparison with whom, to the extent of his own share of the contribution, he would be in a preferential position.

Examination of the early codes reveals how fully justified is the statement by Abbott that ‘this compensation . . . known by the name of Salvage, and at present . . . commonly made by payment of money . . . in the infancy of commerce was more frequently made by the delivery of some portion of the specific articles saved or recovered³.’

And to-day, on the institution of proceedings *in rem*, the property itself may by the Court of Admiralty be arrested and if necessary sold, so to give effect to the maritime lien, and to satisfy the salvor’s claim.

Seeing, then, that this compensation must be paid by an owner out of the *res* itself, if he would retain, or—as in the case of a derelict—regain its possession, salvage is a sacrifice as ample and complete as goods thrown overboard, or a mast cut away to lighten a ship in a storm.

Inasmuch, therefore, as it is not deducted but remains a component part of the assessable value of the property saved, salvage contributes to its own loss in as real a manner as jettisoned cargo in general average⁴.

6. Where, ultimately, nothing has been saved, there is no contribution for property sacrificed.

Whenever a general average sacrifice is followed by a total loss of the adventure, the sacrifice has failed of its purpose, and the principle to deduct the general average expenditure. This, however, is not the practice, and might, perhaps, be repugnant to the priority of the salvor’s maritime lien.

¹ Law of General Average, 4th ed., p. 38; Arn. Ins., 2nd ed., p. 937.

² Ibid., p. 291.

³ *Supra*, p. 397.

⁴ Similarly, Extraordinary expenditure, which in one way or another has to be met by the parties to a marine adventure, is made to contribute in General Average.

property destroyed but anticipated an inevitable fate. Destruction has overtaken the whole, and no part has in result been benefited at the expense of the remainder. Nothing has survived to contribute, and there is no contribution.

Successive judges of the Court of Admiralty have long established the principle, that no award for salvage can be maintained, unless some part at least of the property shall have been preserved, and restored to its owner. And this once again in 1883 by Lord Esher M. R.:—

‘There is one element invariably required by Admiralty law in order to found an action for salvage: there must be something saved more than life, which will form a fund from which salvage may be paid; in other words, for the saving of life alone, without the saving of ship, freight, or cargo, salvage is not recoverable in the Admiralty Court¹.’

Though the proposition under consideration may, so far, have been shown to be true, it is in attempting a more extended application of its principle that a fundamental difference between general average and salvage is revealed and accentuated. For a general average act may consist of a sacrifice, or yet again, of an extraordinary expenditure. Suppose that a vessel, the destination of which was London, were towed into a foreign port under circumstances entitling the tug owner to rank as a salvor in this country; and that the salvor holding himself deserving of a higher reward than the one stipulated for, and relying on the equitable jurisdiction of the Court of Admiralty—or for other reason—postponed the enforcement of his claim until the vessel should have arrived at her destination, and that in the meantime she were totally lost; the salvor—a salvage agreement notwithstanding—being unable to plead ‘the one element invariably required by Admiralty Law in order to found an action for salvage’ (*The Renpor, ubi supra*), would be deprived of his remedy, and his efforts however strenuous, however meritorious, must of necessity go unrewarded. Whereas, on the other hand, had the agreement been made by way of a contract of employment for reward, the same man—a salvor, strictly no longer—would at common law be in a position to compel recognition of his service, the loss of the vessel in no way preventing him, and his remuneration being an extraordinary expenditure incurred for the benefit of the common adventure, would be contributed for in general average². The difference between these two forms of agreement is emphasized in *The Renpor*, where the facts taken from

¹ *The Renpor*, 8 P. D. 115. See also Dr. Lushington in *The Chieftain* (1846) 4 Notes of Cases, 460.

² The contributory values in such a case would be those sought to be saved.

the head-note of the case were as follows:—A steamship was requested by another steamship in distress to stand by her. An agreement was accordingly made between the two masters for a fixed sum that the sound vessel would remain by the damaged one till she was in a safe position to get to port. The sound vessel remained by the damaged one until the latter was about to sink, when she took her crew on board, and the damaged steamer immediately afterwards sank.

Lord Esher M.R. found that 'an action in the nature of a common law suit' could not be supported on the agreement, for it was a proper salvage agreement 'which fixes the amount of salvage to be paid both for service to life and property, but leaves untouched all the other conditions necessary to support a salvage award. As therefore both on principle and on the construction of the contract itself there must be something besides life saved to make it effectual, I am of opinion, that neither owner nor master are liable in this action because no *res* has been saved.'

For salvage is a charge, by operation of law attaching to the property itself, while general average expenditure is a debt incurred on behalf of its ownership¹. And yet, this fundamental difference—wide stream of separation never to be bridged over—frankly, aggressively even, confessed, it is submitted that resemblance to general average remains, sufficient to justify the classification of salvage as an obligation 'of the same nature,' and so, in the perils clause, to bring it within the purpose of the words—'Jettisons . . . and of all other perils'².

Here, then, it is, that salvage is expressed to be a peril insured against, and the payment of it a loss, the direct and immediate consequence of that peril³.

Is this conclusion in accord with authority?

Park, writing in 1817, says:—'The question is how far the insurers are affected by the allowance of salvage. By their own contract they expressly agree to indemnify the insured against such charges⁴.' In proof of this he sets out at length the sue and labour clause which is to be found in every policy of Marine insurance. But on the next page (226) he adds:—'In order to

¹ In *Cornu v. Blackburne* (1781) 2 Dougl. 640 at p. 648, Lord Mansfield said:—'They seem to have mistaken the nature of salvage. They seem to consider it a debt which may be exacted. But no man can be compelled to pay salvage, unless he chooses to have the property back.'

² This does not pretend to be an exhaustive comparison. Main characteristics only are touched on. Minor differences exist, but not, it is thought, inconsistencies.

³ See *Trinder, Anderson & Co. v. The Thames & Mersey Ins. Co.* [1898] 2 Q. B. 114, C. A. considered L. Q. R. xxi. at p. 158.

⁴ *Supra*, p. 225.

entitle the insured to recover the expenses of salvage, it is not necessary to state them in the declaration as a special breach of the policy; because an insurance is against all accidents, and salvage is an *immediate and necessary consequence of some of those stated in a policy*¹. For this he cites *Cary v. King* (1736) Cases temp. Hardwicke, 2nd ed. p. 304.

In 1802 Marshall writes:—‘As the insured does not, in express words, undertake to pay salvage, perhaps the insured could not declare for a loss by the payment of salvage. . . . Indeed it would be useless to declare so, for he may declare as for that species of loss which occasioned the payment of salvage, and recover the salvage actually paid.’²

And again at page 729 of the same volume:—‘The plaintiff may give in evidence any loss or damage which is an *immediate consequence of the accident or injury*, alleged in the declaration, . . . as where the question was, whether the plaintiff might give in evidence the expense of salvage, though not particularly stated in the declaration.’ For each of these statements he refers, as did Park, to *Cary v. King* (*supra*), where Lord Hardwicke said—‘I think they may give it in evidence; for the insurance is against all accidents.’

In his 1st edition, 1848, vol. ii, p. 846, Arnould says:—‘The liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the law of the land or the general law maritime a *direct and immediate consequence of the perils against which he does insure*’³.

And lastly, Lord Blackburn in *Aitchison v. Lohre*⁴ (1879), convinced and relentless:—

‘The policy contains the usual clause as to suing or labouring. The Queen’s Bench Division was of opinion that the salvage or general average expenses described in the case did not come within that clause. The Court of Appeal was of a different opinion⁵. . . . And such seems to be the opinion of the editor of the last edition of Arnould on Insurance, who says⁶ that salvage “is recoverable from him in virtue of an express clause in the policy inserted for such a case and known as the sue and labour clause”; but for that position he cites no authority, and though the Court of Appeal

¹ Italics wherever they occur are the writer’s.

² Ins., 3rd ed., 1823, edited in the author’s lifetime by his son, Charles Marshall, of the Inner Temple, vol. 2, at page 557.

³ In reproducing this statement the editors of the 7th ed. (1901) add a note (Z) at p. 974 vol. 2, that if the words in the text ‘are not substantially correct, it is difficult to see exactly on what principle Salvage is recoverable under a Lloyd’s Policy, the House of Lords having refused to allow it to be recovered under the suing and labouring clause.’

⁴ 4 App. Cas. at p. 764.

⁵ 3 Q. B. D. 558 (1878).

⁶ 2 Arn., 5th ed., at p. 778 [David MacLachlan, 1877].

in this case agreed with him, I am unable to do so. With great deference to the Judges of the Court of Appeal, I think that general average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do. . . . The object [of the clause] was to encourage exertion on the part of the assured; not to provide an additional remedy for . . . a loss which was by the maritime law *a consequence of the peril*. . . . Salvage occasioned by a peril has always been recovered without dispute, under an averment that there was a loss by that peril: see *Cary v. King* (*supra*), and I have not been able to find any case in which it was recovered under a count for suing and labouring.'

Thus, authority is unanimous in establishing the doctrine that salvage is the *direct and immediate consequence of a peril insured against*. And against this authority there is no appeal¹.

Differing then possibly, though not certainly, in respect of the reasons on which it is based, the conclusion submitted possesses the qualification—without which it could not with utility be propounded—of according with the judgment of the House of Lords, as it does also with the dicta of Park—his interpretation of the sue and labour clause not included—of Marshall and of Arnould, text-writers of authority as yet unsurpassed. And though none may lightly differ from Park², a solution, conflicting with the determining decision of the highest tribunal in the land, by reason of its futility, must surely be discredited.

H. BIRCH SHARPE

¹ It is true that Lord Blackburn is reported to have used the word 'consequence' without qualification. None the less it is suggested that Sir Walter Phillimore, arguendo in *Nourse v. Liverpool &c. Indemnity Assn.* [1896] 2 Q. B. 16, correctly interpreted his Lordship's words as deciding that Salvage 'is treated as a loss *directly* occasioned to the subject-matter of insurance by a peril insured against.'

² The Court of Appeal in *Lohre v. Aitchison* shared his opinion (see *supra*).

LEGAL CONCEPTIONS FROM A PRACTICAL POINT OF VIEW.

A LEGAL conception may be in the form of a proposition or a term in a proposition—either a general statement or a general name. If in the form of a proposition or statement it will usually come under some head of what are known as legal fictions; if in the form of a term or name, it will not be an ordinary general name, but will denote merely an abstraction—what may be called a metaphysical entity.

Legal conceptions bear a considerable resemblance to those scientific conceptions which are known as hypothetical assumptions. There are, however, two points in which the legal conception differs from the scientific conception. In the first place, the legal conception may at one time have been a correct representation of actual fact. In the next place, the legal conception is not regarded as a merely convenient general statement, name, or explanation of facts; it is an entity whose existence is not allowed to be gainsaid, but on the contrary is assumed to be immutable, until changed by competent authority, for the purpose of determining those rights with which jurisprudence has to do.

This immutability is the most striking feature of legal conceptions, and the unwillingness of the competent authority to change existing legal conceptions is one of the principal causes both of the aloofness of jurisprudence from the practical business world, and of the difficulty which is experienced by lawyers themselves in reconciling its theoretical and practical sides.

One definite result of this immutability of legal conceptions is that the legal view of rights which, in case of difference of opinion, have to be determined in courts of justice, is not identical with the popular view held by the persons who own or claim the rights. Another somewhat singular result is that the popular view influences even the law-making authorities—the Legislature and (so far as ‘judge-made law’ is a correct expression) the Judicature, who might be supposed to be capable of adhering strictly to the technically correct view. This technically correct view is constantly, so far as actual language is concerned, abandoned both in statutes and judgments of the Courts, and the language used only reconcilable—grammatically and logically—with the position that the popular

or incorrect view has become embodied in an immutable legal conception.

This may be illustrated by taking instances of legal conceptions from different fields of law: (1) constitutional law; (2) property law; (3) law relating to persons; (4) law relating to procedure.

(1) *Constitutional law.* The conception of the Sovereign as owning public property, and entering into contracts concerned with public business, is a conception which, as a legal conception at variance with the popular view, is illustrated in a striking manner by the position of the Crown in the self-governing territories of the empire outside the United Kingdom. The popular conception is that each Colonial Government is a sort of independent body, directly recognized in law as an ordinary partnership would be recognized. It seems possible that under the new Australian federal constitution the Crown may yet come to be recognized, in representing different political bodies, as 'several juristic persons': see *Municipal Council of Sydney v. The Commonwealth* [1904] 1 C. L. R. at p. 231. But the Privy Council—though the federal constitution was not here concerned—has quite recently upheld the strict technical view of the identity of the Crown as a person in representing different political bodies: *Williams v. Howarth* [1905] A. C. 551. In many instances, both in the United Kingdom and in the dominions beyond sea, the anomaly caused by this legal conception has been got rid of by vesting public property and the right of contracting in special bodies of Commissioners; in other instances, special legislation enables the Crown to hold particular kinds of property, and enables litigation to be carried on between the Crown and subjects. But both in English and Colonial statutes the 'State' is sometimes mentioned as if it were a complete legal entity: see *Land Transfer Act, 1897*, s. 23 (3), where 'the State' is mentioned; the (Australian) *Land for Public Purposes Acquisition Act, 1901*, where 'State' and 'Commonwealth' are mentioned, and see especially s. 50, where it is enacted that 'for the purposes of this Act the Commonwealth shall be deemed to be a corporation sole (1) by the name of "The Commonwealth of Australia".'

(2) *Property law.* The legal conception of an 'estate' in land held of the Crown lies at the root of English land law; the popular conception rather accords with the theory of Roman law, which regarded land as property capable of being owned in as absolute a manner as chattels are, and only differing from chattels in being immovable. Notwithstanding the existence of the 'estate' as an immutable legal conception in English law, the expression 'owner' or 'proprietor' of land is commonly used both in judgments of the Courts and in statutes: see *Sutton's Hospital* case, 10 Co. Rep. 1;

Doe v. Walker, 5 B. & C. 111, 29 R. R. 184; Land Drainage Act, 1861, s. 35; Land Registry Act, 1862; Land Transfer Acts, 1875 and 1897, *passim*. The conflict between the legal and the popular view was recognized by the Real Property Commissioners in their Third Report of 1832, and they, on deliberate consideration, rejected a suggestion that the fundamental principle of tenure should be abolished and all land be made allodial, on the ground that the tenure of free and common socage had all the practical advantages of allodial ownership. Though the substantial identity for practical purposes of socage tenure in fee simple and allodial ownership cannot be denied, yet the greater part of the existing complexity of English land law seems to be due to the continued existence of the fee simple estate as a legal conception.

The substantial identity between the dominium of the Crown and the 'estate' of a subject in land, and judicial neglect of the technical distinction between the two things, are curiously illustrated in a case before the Privy Council, where 'the seisin in fee of the Crown' is spoken of: *Nireaka Tamaki v. Baker* [1901] A. C. at p. 574 (a New Zealand case).

(3) *Law relating to persons.* Questions relating to the rights, and methods of enforcing the rights, of natural persons who constitute a firm or other body of persons more or less organized, of the artificial or group persons known as corporations aggregate, and of the natural persons who are members of a corporation aggregate,—questions of this kind afford striking illustrations, and perhaps the most interesting illustrations in the eyes of a jurist at the present day, of the divergence between the technical and the popular view. On the one hand, the popular view of a firm or a trade union is that they are legal entities hardly distinguishable from the lawyer's corporation aggregate, and are really conceived of as having a personality and legal rights and liabilities distinct from the personalities, rights, and liabilities of the persons constituting them. On the other hand, the essential feature of a corporation, and its recognition in law as an entity or personality distinct from the whole sum of the natural persons who are its members, are frequently overlooked by business men, especially as regards corporations constituted by registration under the Companies Acts. A business man who is a member of a firm nearly always thinks of his firm or 'house' as a separate entity. But if he and his partners take advantage of the Companies Acts in order to secure limited liability, they and the general public will seldom appreciate the fact that, as the law now stands, registration under the Acts has brought a new corporation into existence. Hence the very prevalent custom of addressing limited companies as *Messrs. Brown, Jones, and Robinson, Limited*;

this technically incorrect usage is even adopted by lawyers, as may be seen by a letter from the author to the publishers prefixed to the second (temporary) volume of Williams' *Vendor and Purchaser*.

In this branch of law it seems possible that the efforts of jurists to bring about some sort of reconciliation between technical and popular views may at no distant date prove successful, and that the legal conception of a 'person' may be so far widened as to find room for group or collective persons other than what are now known as corporations. The subject of the true nature of the corporation has been much discussed in recent years, and the liking of English lawyers for the 'fiction' theory appears now to be on the wane¹. If the theory of the corporation being a real group or collective person, above and distinguished from the natural persons who are its members, comes to be recognized as the true theory of the English law of corporations, the recognition of organized bodies of men, which are not technically corporations, as legal entities would seem to be somewhat nearer. The language of the Courts and the Legislature appears to be growing bolder, both in recognizing the reality of a corporation's personality, and in recognizing the eventual possibility of non-corporate bodies of men becoming real legal entities. The heading to section 26 of the Companies Act, 1900 (63 & 64 Vict. c. 48) is 'defunct companies,' and the dissolution of such a company is spoken of in such a way as to suggest that the dissolution is rather the death certificate than the act of execution. The Rules of the Supreme Court enabling firms to sue and be sued (Order 48 a), and the judgments in the House of Lords in *Taff Vale Railway v. Amalgamated Society of Railway Servants* ([1901] A. C. 426), go a long way towards recognizing firms and trade unions as 'legal entities.' There is a curious note of uncertainty in Lord Macnaghten's words (p. 440), where he says: 'A partnership firm, which is not a corporation, *nor I suppose a legal entity*, may now be sued in the firm's name.'

(4) *Law relating to procedure.* A most inconvenient legal conception has been established by the Court of Appeal in *In re Scott & Alvarez' Contract* [1895] 2 Ch. at p. 614, where it is laid down that the Supreme Court of Judicature has a 'double jurisdiction,' the logical result of which the Court admitted to be unsatisfactory. But for the supposed necessity of this conception of a double jurisdiction, the case of *In re Scott & Alvarez' Contract* would have been decided differently. That it is not impossible to dispense with

¹ See an article in the L. Q. R. vol. xxi, p. 365 (October, 1905), by Professor Jethro Brown, and references there to the writings of Professor Maitland and Mr. Dicey; Pollock and Maitland, *History of English Law* (2nd ed.), vol. i, p. 486, note; Pollock on Contracts (7th ed.), 113-116; Pollock, *First Book of Jurisprudence* (2nd ed.), 112.

this particular conception seems clear from the view, elsewhere taken by the Court of Appeal, that since the Judicature Acts there may under some circumstances be a single composite estate or interest, instead of two estates as formerly, one at common law and another in equity : see the observations made, and cases cited, by Farwell J. in *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. at p. 617.

The necessity or desirability of making such changes in the law as to bring legal conceptions into line with popular views must, of course, vary greatly in individual cases. Probably the fictions involved in the conceptions of constitutional law cause less general inconvenience than the fictions in other branches of law, and have some sentimental arguments in favour of their retention. All conceptions, however, which are really fictitious, involve waste of power to the community, and the burden of proof should be on those who advocate their continued existence. Particularly with respect to fictitious conceptions of property rights does reform seem to be advisable ; the existence of fictions necessarily impedes transactions with property, and renders the law of property more difficult to acquire and practise. The inconvenience produced by long delayed reform in legal conceptions is illustrated in the case of Fines and Recoveries. The conception of an estate tail being incapable of being barred otherwise than by means of fictitious litigation continued to exist for about 180 years after the first attempt, made during the Commonwealth, to change it.

In order to carry out effectually any legislative scheme of law reform which included changes in legal conceptions, it would be necessary to adopt a method of drafting statutes somewhat different from that which now prevails. Whilst safeguarding existing rights, it would be necessary to frame a statute in such a way as to make it clear that a principle was laid down, which could be followed by the interpreting authority in applying the statute to individual cases. Two examples, the one good and the other bad, will make this clearer—the Act of 1660 for abolishing the military tenures (12 Car. 2, c. 24) and the Married Women's Property Act, 1882.

By the Act of 1660 all tenures of knight's service, &c., were 'enacted to be turned into free and common socage,' and all conveyances, &c., were to be construed as if the lands 'had been then held and continued to be holden in free and common socage only.' This enactment effects a radical reform by laying down a distinct principle in general terms, and does not seek to remedy a number of inconveniences in detail by a number of particular enactments.

With this method of legislating compare the method adopted in the Married Women's Property Act, 1882, by which it appears to

have been intended to effect a reform quite as radical in kind. An attempt is made to remedy, by a number of particular enactments, various inconveniences which occurred to the draftsman as requiring remedy, with the result that a new and troublesome legal conception is created—the legal separate estate—and many cases which required remedy were left unprovided for. The necessity for the numerous decisions on the meaning of the Act, and the enactment of two amending Acts, might have been saved had the required reform been effected by laying down the definite principle that coverture was not to create any disability, or difference of legal status, in a woman; there would have been no difficulty in keeping on foot the existing rules as to restraint on anticipation of settled funds, if desired.

If legal conceptions could be made to accord with existing modern conditions, further necessary law reform would be made easier, and business men and owners of property would have far less difficulty in understanding their rights. The interpretation of the law would also be rendered very much less difficult for lawyers. The difficulties at present experienced both by laymen and lawyers, in consequence of the existence of immutable legal conceptions which do not accurately represent either existing facts or popular notions, must increase with the increase of the statute law; the statutes themselves, and the judges, as already pointed out, are frequently on the popular side, as against the jurists, in sanctioning untechnical views. Meanwhile, the juridical view remains the legal and technically correct view until changed by statute, or until some Court is bold enough to decide, in the absence of a reforming statute, that the juridical view has undergone a change.

JAMES EDWARD HOGG.

THE LEGAL PERSONALITY OF A FOREIGN CORPORATION.

AS long as uncommercial corporations, cities, chapters, universities, and hospitals, were the principal members of their class, it was natural for people to think of a corporation as fixed to one place from which it could not move. In England this natural tendency found expression in the early rule of law, that every corporation must be incorporated as of some locality. It was said that the titular locality of incorporation must be limited to some certain place, such as a town, and must not be too large and uncertain, such as a county or bishopric¹: and from this it seems as if the necessity for a titular locality may have grown from the common idea that a corporation was tied to one place. But the idea that the titular locality was the place to which it was tied vanished in course of time, and left the necessity for such a locality as a mere arbitrary rule. Already in the sixteenth century the locality might be fictitious. Catherine, the first wife of King Henry VIII, had a licence to found a chauntry by the name of the Chauntry 'de Monte Calvarie extra Algate Lond.'² People did not think of the corporation as resident on Mount Calvary by Aldgate. When the titular locality could be fixed at a fictitious place, the reason for the rule that such a locality was necessary had been forgotten; and the rule having become a mere formality was in course of time itself forgotten also.

In contrast with the habits of modern trading corporations, corporations of the old type were content for the most part to stay at home. From early times, indeed, companies of merchant adventurers and chartered companies differed prominently from other corporations in this respect; but partly by chance, partly because of their own circumstances and those of their times, their foreign operations gave little trouble to lawyers of the foreign lands in which they were conducted; and questions about the status of foreign corporations were thus preserved for later times to discuss. Until the beginning of the seventeenth century companies of merchant adventurers, when they possessed any corporate character at all, were incorporated for the purposes of internal administration only. The company as a person concerned itself

¹ Vin., Abr. Corporations (D).

² Coke, 10 Rep. 32 b.

only with the government of its members; and each member traded on his own account. The courts of the foreign land where the trade was conducted were not asked to judge between the company as a person and the inhabitants of the land. As far as they were called upon to judge between the members of the company in matters of its internal administration, usually they had to deal with rights and duties created as much by the law of their own land as by that of the land from which the company came; for usually the original privileges or charter of the company were confirmed by the sovereign of the foreign land. In the thirteenth century, for instance, the merchants of the Hanse trading in England held a privileged position under the Crown, and the English merchants trading in the low countries held a grant of privileges from the Duke of Brabant. Similarly, in later times, the Emperor Charles V confirmed the privileges of the company of English traders in Spain; and the companies of Muscovy and of the Levant were recognized by grants of privileges from the Czars and the Sultans.

In 1612 the joint-stock principle made its appearance upon the reorganization of the East India Company. Thenceforward in the dealings of chartered companies abroad the members stood behind the company instead of the company standing behind the members. Had these companies carried on business in civilized lands, their personalities might have been forced upon the attention of the courts, and lawyers might have begun to discuss their status two centuries earlier than they did. But in the East Indies, in Africa, in the South Seas, or in Hudson's Bay, there were no lawyers to concern themselves, or at least such lawyers as there were would not have been allowed to concern themselves about such questions; and the questions remained undiscussed. When, however, during the nineteenth century joint-stock companies and other trading corporations began to pass about from one to another of the civilized states of Europe, it became possible and necessary for lawyers to consider the nature of their status and capacities in countries other than those in which they were originally incorporated. During the last twenty years the importance of such questions to the commercial world has greatly increased. English companies have acquired large interests, and carry on great businesses abroad. An important insurance business is conducted in this country by American corporations. Foreign corporations are frequent litigants in English courts, and English companies in foreign courts. The courts of the United States have provided a large number of decisions upon the status and capacities of corporations which carry on business in states other than those in which they were

incorporated; and the status of such migrating corporations has been firmly established for practical purposes in many countries by international treaties.

Business in these cases is being carried on with the assistance of legal theories about artificial personality; but perhaps the practice of the business men has strained a little some theories prevalent amongst lawyers. Theory in this region seems to be lagging a little behind fact: and the discrepancy is another instance of the shortcomings of those ideas about the nature of the legal personality of a corporation which are criticized and condemned by jurists who follow Dr. Gierke in Germany and Professor Maitland in England. The nature of those criticisms are now well known to readers of this Journal. It is therefore unnecessary to recapitulate here in detail the conflicting opinions of those who uphold the older theory, derived from Roman law, that a corporation's personality is pure legal fiction, and of those whom we may now call realists. The latter teach us that 'the personality of the corporation aggregate is in no sense and no sort artificial or fictitious, but in every whit as real and natural as the personality of a man'¹. But their teaching, in this country at least, has hardly permeated below the higher and more remote regions of jurisprudence. Arguments and decisions in the law courts, in which it is material to consider the nature of the personality of a corporation, still proceed upon a theory which is something very like the fiction theory, pure and simple. Sir Frederick Pollock, in stating the theory of corporations that is prevalent in England, speaks of 'the Roman invention, adopted and largely developed in modern systems of law, of treating the collective persons who from time to time hold [the position of being charged with offices of a public nature involving the tenure and administration of property for public purposes, or interested in carrying out a common enterprise or object]—or, in some cases, and according to some opinions, the property or office itself—as a single and continuous artificial person or ideal subject of legal capacities and duties'². 'It is possible,' he continues, however, 'to regard the artificial person so created as a kind of fictitious substance, conceived as supporting legal attributes': and to this it may be added that few English lawyers would be wary enough to reject this expression of the theory of fiction as a true expression of the law of England. None at least would hesitate to accept as good English law the theory as to the genesis of a corporation which grows out of the fiction theory, and which is known as the concession theory. In the form into

¹ Maitland, *The Corporation Sole*, L. Q. R. xvi. 335.

² Pollock, *Principles of Contract*, 7th ed., p. 113.

which this theory grew from Roman law, Professor Maitland states it vividly thus: 'the corporation is and must be the creature of the state. Into its nostrils the state must breathe the breath of a fictitious life, for otherwise it would be no animated body, but individualistic dust¹.' 'With us in England,' says Blackstone, 'the king's consent is absolutely necessary to the erection of any corporation².' No editor has thought it necessary to add a qualifying note; and since the case of Sutton's Hospital no English lawyer would have hesitated, and none would now hesitate, to accept Professor Maitland's sentences as an exposition of English law.

Since the time when trading corporations first began to carry on business in civilized states other than those in which they were incorporated, difficulties have been felt in understanding their status in the foreign states by lawyers whose minds have been held by the prevalent theories of fiction and concession. Its personality is conceded to a corporation by the state, and exists only as a fiction of the municipal law of the state which conceded it. The authority of the state does not extend, and its municipal law has no jurisdiction, beyond the frontiers of the state. How, then, can the corporation exist outside the medium, as it were, of which it is composed? In 1839 this question was debated in a case in the Supreme Court of the United States, *The Bank of Augusta v. Earle*³. Mr. Chief Justice Taney recognized the difficulty, and suggested a way of overcoming it. 'A corporation,' he said, 'can have no legal existence outside the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate and is no longer obligatory, the corporation can have no existence'; but this was not to be fatal to the possibility of a corporation migrating: 'Natural persons,' he continued, 'through the intervention of agents are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of their agreements. And what greater objection can there be to the capacity of an artificial person by its agents to make a contract in a sovereignty in which it does not reside; provided such contracts are permitted to be made by them by the laws of the place? As in the case of natural persons it is not necessary that the corporation should actually exist in the sovereignty in which the contract is made.' The opinions expressed in this passage have been from time to time repeated, and

¹ Maitland, Introduction to Gierke's Political Theories of the Middle Ages, p. xxx; and see generally Carr, Law of Corporations, chaps. xii and xiii.

² Blackstone, Comm. I. 472.

³ 13 U. S. Pet. Rep. at p. 588.

in substance are still generally accepted as a satisfactory account of the status of the migrating corporation¹. The corporation, it is said, cannot go abroad without losing its personality and splitting up into its constituent members. It preserves its existence, therefore, by staying at home itself, and sending its agents abroad to act for it. The foreign state recognizes the absent corporation as the principal in the transactions, a recognition which is based upon international comity: and so the corporation is enabled to discharge its functions in places where it could not exist itself. The theory is analogous to that according to which, in the eye of the law, a corporation is capable of committing an assault.

In the passage which has been quoted the problem of the status of a migrating corporation is dealt with as a geographical problem; the difficulties in its way are pictured as difficulties in passing certain physical boundaries. The solution of these difficulties by means of the law of agency seems at first sight satisfactory, since agents can pass barriers which are merely physical. It conforms also to at least one set of facts, for the contracts of a trading corporation made for the purposes of its business in states other than that in which it was incorporated do usually take the form of contracts made by an agent for a foreign principal. The local manager contracts as agent for the directors, who are themselves agents for the foreign corporation; and the foreign corporation is expressed to be the principal to the contract. But the solution is not equally satisfactory in other directions. In particular it conflicts with the common sense which is enshrined in modern theories about domicile. The domicile of a corporation is the place in which, by a legal fiction, its personality is assumed to be present for some purpose, such as to give the local courts jurisdiction over it. It is said that it is a necessary consequence of the fiction theory that, outside the boundaries of the sovereignty by which it is created, a corporation can have no legal existence: and to say that, is to say in other words that its personality cannot pass those boundaries so as to be present anywhere beyond them. But since the domicile of a corporation is a place where its personality is assumed to be present, in a place where its personality cannot be present the corporation can have no domicile. A corporation cannot therefore have a domicile outside the boundaries of the sovereignty by which it is created. But it is natural for people to think that the personality of a corporation is present, and that the corporation is domiciled, where there are most outward signs of its activity; and the rule of English law upon the subject expresses

¹ *The Status of English Companies Abroad*, E. Manson. *Journal of the Society of Comparative Legislation*, N. S., vol. i, p. 11.

this tendency. 'The domicile of a corporation,' says Professor Dicey, 'is the place considered by law to be the centre of its affairs which (a) in the case of a trading corporation is its principal place of business where the administrative business of the corporation is carried on, (b) in the case of any other corporation, is the place where its functions are discharged ¹.' In the case of a corporation carrying on business in a state other than that in which it was incorporated, the centre of affairs may be, and often is, situated in the foreign state. When that is the case, the courts of the foreign state are naturally inclined to act upon the above rule of law and common sense by treating the corporation, for the purpose of exercising jurisdiction over it, as domiciled at that centre. In this country, and in others where the common law prevails, the courts have had a special incentive to regard a foreign corporation as domiciled within the territorial limits of their jurisdiction and present there in its own personality; for the rule of the common law that service upon a corporation must be effected upon its chief officer prevented them from obtaining jurisdiction over a foreign corporation which had to be considered as present within those limits by its subordinate agents only. The case of *Carron Company v. Maclaren* ² is the first case decided by an English court which displays this tendency in action. Lord St. Leonards there held that a Scottish company might have a domicile in England which would enable the English courts to exercise jurisdiction over it. The rest of the court (although they differed from him on the facts of the case) agreed with him in this statement of the law; and his judgment has since been frequently referred to with approval both in the United States and England ³. In *Newby v. Von Oppen* ⁴ Mr. Justice Blackburn drew the distinction between a foreign company which merely employs an agent in England and one which must be treated as resident in England, and held that a certain American company had in fact a residence in England at which a service could be effected on the company. In the United States the courts have sought to avoid a similar conclusion ⁵; and in many states, in order that the courts might be able to exercise jurisdiction over foreign corporations, statutes have been passed to negative the effect of the common law rule as to service upon a corporation by requiring foreign corporations to appoint an agent for service of process in the state as a condition of doing business in the state. But it is now generally considered that a corporation may acquire a business domicile in a state other than that in which

¹ Dicey, *Conflict of Laws*, Rule 19.

² 5 H. L. C. at p. 450.

³ e. g. *Haggin v. Comptoir d'Escompte de Paris*, 23 Q. B. D. 519.

⁴ L. R. 7 Q. B., p. 293.

⁵ *Reimers v. Sealeo Manufacturing Co.*, 70 Fed. Rep. at p. 577.

it was incorporated, and that whenever it does so it may be sued there without the aid of local statute law¹. If therefore it is a true consequence of the fiction theory that outside the boundaries of the sovereignty which created it the personality of a corporation cannot exist, and therefore the corporation cannot be domiciled, in holding that theory we must be content to be at variance with common opinion and courts of law, which persist in believing that the personality of the corporation can exist in a very real sense outside those boundaries, that it can be domiciled and resident there, and subject in consequence to the jurisdiction of the local courts, just as a natural person can.

But it is questionable whether this geographical manner of considering the problem of the status of a migrating corporation is not a misleading manner. A truer statement of the problem is from the point of view rather of metaphysics than geography. The problem has usually been discussed in connexion with questions of jurisdiction, and for that reason the geographical aspect of the question has been pushed into the foreground. The physical absence of a corporation from the scene of its activities in a foreign state is material in considering the question whether the courts of that state can exercise jurisdiction over the corporation; but it is not material in considering another and a more fundamental question, whether the fictitious personality which is conceded to a corporation by one state can become in another the 'subject' of any legal rights and duties at all. In the special case of a contract, for instance, the first question is, how can the contract of the foreign corporation be enforced? the second and the more fundamental is, can the foreign corporation make a valid contract at all? The law of agency, it is said, will help us to answer the first question, in which we are concerned with jurisdiction: but it will not help us to answer the second, in which we are concerned with power and capacity; for if a principal has no power or capacity in law to perform an act himself, he cannot in general perform it by an agent. An agent can cross a physical barrier, but not one which exists in legal theory.

The theories of fiction and concession lead, it is said, to the conclusion that a corporation can have no legal existence outside the boundaries of the state which created it. The matter would be better expressed by saying that they lead to the conclusion that a corporation, which exists only in the contemplation of some law, can have no legal existence when that law is not contemplating it. Of the two expressions the latter contains the more fundamental

¹ 6 *Thomp., Corp.*, s. 798g.

truth and leads more directly to a clear view of the effect which these theories have upon the problem of the status of a foreign corporation. 'The character of a juridical person,' says Savigny, in a classical expression of the theory of concession, 'cannot be asserted by the mere will of several members acting together or of an individual founder. But for this purpose the sanction of the sovereign authority of the state is also necessary¹.' What is conceded by the sovereign authority of the state is, not leave to the corporation and the public to indulge an instinctive desire to regard the group which is to be incorporated as having a fictitious personality, but that the sovereign authority of the state should exercise itself to maintain a personality in the group. The fictitious personality is a fiction existing in contemplation, not of public opinion, but of law. It is not only created by an act, but it is also upheld by an enduring state of the will of the sovereign authority, and apart from that will it has no objective existence. One whose mind is to be held by the fiction theory must not think of the fictitious personality of the corporation as a sort of ghost of a natural person. 'A corporation has no soul, because it is created by the king and not by God;' and what the king creates, like the emperor's new clothes, has no existence apart from the fact that he, and those who have to think his thoughts, think of it as existing. It is possible to say of the personality of a corporation that, although it does not come into existence until there has been a concession from the sovereign authority, yet once the concession has been made, it has an objective existence of its own, apart from the continued exercise of the will of the sovereign authority; and this is a view which has found favour in France². But in that case it is not a personality which is conceded, but recognition of a personality, and concession is thus reduced to a formality akin to registration in the sense in which a motor-car is registered, and the fiction theory is implicitly abandoned in favour of a view which is indistinguishable from the realistic view, that 'within its own sphere and for its own purposes the artificial identity of a corporation is just as real as any other identity³.'

When it is said that the personality of a corporation is fictitious and exists only in the contemplation of law, the natural meaning and the purport of the words is that the personality is not only created by an act, but also exists in an enduring state of the will of the sovereign authority of the State in which the corporation came into existence. But what then is to become of that personality when

¹ Savigny, *System*, a. 89.

² Mestre, *Les Personnes morales*, p. 170.

³ Pollock, *op. cit.*, p. 114.

it seeks to become the 'subject' of rights and duties upheld by the authority of another state? For the sake of illustration one may consider the case of a contract made by an English company through its local manager in France, to be performed in France. The incidents of the contract will in general be regulated by the principles of the French law of contracts, but even if owing to special circumstances they are regulated by the principles of the law of contract of England or of some other state, the contract is upheld in existence by the sovereign authority of France. It consists, according to the usual analysis, of an agreement and a resulting obligation. The nature of the obligation is that it is a legal bond whereby constraint is laid on a person. In the particular instance, the legal bond is imposed by the sovereign authority of France. The parties to the contract must therefore be persons upon whom the sovereign authority of France is capable of imposing its bond, or there can be no valid contract. They must, that is, be persons in contemplation of French law. A natural person is under any circumstances capable of serving as the object of the French legal bond. Even if he is an English subject, domiciled and resident in England, and contracting in France by an agent only, yet he has his natural self upon which the obligation can be imposed and which enables the law of France to contemplate him as having capacity to contract. With a corporation it is otherwise. 'The individual man,' says Savigny, 'clearly carries with him his claim to jural capacity in his corporeal appearance. . . By this appearance every one else knows that he has to respect the personal rights of such a being, and every judge that he has to preserve those rights for him. But if now the natural jural capacity of the individual man be transferred by a fiction to an ideal subject it completely lacks that natural confirmation¹.' The English corporation in fact lacks just that feature, a natural self, which is essential in order to enable it to play the part of a natural person in France. Its personality is a fiction of English law. Apart from a state of the will of the sovereign authority of England, in which is its only existence, it is nothing; and the sovereign authority of France cannot contemplate a nonentity as exercising a capacity, or constrain it with a legal bond. It has been said that this feature in the nature of the personality of a corporation must absolutely prevent it from becoming the 'subject' of rights and duties upheld by the law of a state other than that in which it was incorporated. At one time the Court of Queen's Bench of Upper Canada was prepared to hold that a corporation could not enter into any contract or transact any business at all in its corporate capacity in a foreign

¹ Savigny, *System*, a. 89.

state¹. The logic of facts, however, has long made that simple solution of the problem impossible. In the courts of this country the right of a foreign corporation to sue upon its contracts in its corporate name has been beyond question since the case of *The Dutch West India Company v. Van Moses*², decided in 1734. Contracts made by English corporations in France, to return to the instance already mentioned, are in fact recognized and enforced as valid contracts under the Anglo-French convention of 1862. The sovereign authority of France does in fact impose its bond upon the English corporation. But then the corporation must be becoming a fictitious person, not only in contemplation of English law, but of French law also; and just as its original fictitious personality had no existence except as contemplated by English law, so its fictitious personality in contemplation of French law has no existence except as contemplated by French law. There is no real objective element in the fictitious personality which can pass from the contemplation of one law to the contemplation of the other and preserve its identity; and the personality in contemplation of the French law must therefore have a different identity from that contemplated by English law. In regulating the character of the fresh personality French law applies the principles of the English law of corporations. The fresh personality is therefore an exact reproduction of the original personality. Nevertheless it is not identical with it, any more than one man's idea of a cube is identical with another man's idea of a cube, although both are ideas of the same abstraction.

The principle of law by which a corporation is enabled to discharge its functions in a foreign state is generally said to be that the corporation is recognized by the foreign state, and that the recognition rests upon international comity. In this phrase the word comity tells us only about the motives for the recognition. The phrase is therefore incomplete as it stands, since it tells us that the corporation is recognized, without telling us what it is recognized to be. The recognition intended is no doubt recognition as a legal personality, for certain purposes, in contemplation of the law of the foreign state. But from what has already been said it seems impossible, if that personality is to be regarded as fictitious, to find any meaning for the phrase so construed unless 'recognize' is understood to mean much the same thing as 'reincorporate.' In order to maintain consistently the fiction theory, it seems that we must be prepared to hold that the recognition, no less than an act of formal reincorporation, is really the creation of a new and distinct personality. The foreign

¹ *Genesee Mutual Insurance Co. v. Westman*, 8 U. C. Q. B. 487.

² 1 *Strange*, 611.

corporation will not, by reason of the species of reincorporation usually called recognition, become similar in character to the domestic corporations of the state to which it migrates, because that state will in general apply to its constitution the principles of the law of corporations of the state in which it was first incorporated. But in a true sense it will be a domestic corporation of that state; and it is not impossible that its position as a domestic corporation in this qualified sense should have a practical effect on the liabilities of its members, if, for example, the foreign state should seek to impose upon the corporation as a condition precedent to 'recognition' liabilities inconsistent with its original charter¹.

Mr. Bigelow, in his learned annotations on Story's Conflict of Laws, argues that a foreign state has no more difficulty in recognizing in a literal sense the fictitious personality of a migrating corporation than it has in recognizing a contract, for instance, made by parties beyond its jurisdiction, who subsequently come within it. It might be said that just as in that case there are not two contracts, but the contract is the same whether it is recognized by the law of one state or of another, so in the case of a corporation there are not two fictitious personalities, but one². But the identity which is preserved by a contract under the circumstances is only partial. It contains a real and natural element, that of agreement, and this reality maintains its identity, as the real personality of a natural person does, whatever may be its circumstances. But the obligation which is imposed upon the agreement is created and upheld by some authority. When the parties migrate, the obligation imposed upon them is no longer an obligation of the law of the land in which the contract was made, but of the law of the land to which they migrate. The obligation, and therefore the contract also of which the obligation is an essential part, suffers thereby the same change of identity which the fictitious personality of a corporation suffers. It becomes an obligation created and upheld by the authority of the foreign state instead of the authority of the state in which it was first created; although as in the case of a corporation, if in the particular case the foreign state applies to the contract the principles of the law of contract of the original state, the new identity may be an exact reproduction of the old. It is only the real element in the contract, that of agreement, that retains its identity, and can therefore be recognized in the literal sense by the foreign state. The

¹ e. g. *Riedon Iron Works v. Furness* [1906] 1 K. B. 49 (noted on p. 122 above), where an attempt was made to impose upon the members of an English limited liability company, by means of a law of the State of California, liabilities inconsistent with the limitation contained in the Company's memorandum of association.

² 8th ed., p. 178.

personality of a corporation, in order that it may be capable of being recognized in the same way, must have a similar real element in its nature ; and if in its nature there is an element of reality, then it is not pure fiction.

In order to reconcile the legal activities of a migrating corporation with the fiction theory, we must add fiction to fiction. If we are to be consistent followers of the theory, we must conceive that a corporation, which becomes the 'subject' of rights and duties in a foreign state, loses its identity ; that its personality is different in the contemplation of the law of each state in which it seeks to discharge its functions ; so that it has as many personalities as there are states. And yet common sense tells us that there is only one corporation ; and that the personality contemplated by the law of France is in no true sense different from that contemplated by the law of England. To tell us that, however, is to tell us that the personality of a corporation has an objective existence which is capable of being the common object of contemplation for several municipal laws ; that it shares, in fact, with a natural person the quality of reality which enables the latter to be recognized as a person by any law without loss of identity, and that it is 'in no sense and no sort artificial or fictitious, but in every whit as real and natural as the personality of a man.' If we are to understand the 'recognition' by a foreign state as in no sense implying a reincorporation, but in its literal sense, as a recognition of an existing object, then the object which is recognized must have something more than a fictitious existence, for in the words of a recent upholder in the pages of this REVIEW of the theory that the personality of a corporation is real : 'When we say that this corporate person is not a legal fiction, we imply no more than that it is a representation of psychical realities which the law recognizes rather than creates ¹.'

We must, in short, have many fictions or none. The theory of a fictitious personality applied to the status of migrating corporations leads to conclusions which are in conflict with common opinion and common sense, and, if we reject them, we are accepting the theory of a real personality.

E. HILTON YOUNG.

¹ Jethro Brown, *The Personality of the Corporation and the State*, L. Q. R. xxi. at p. 372.

THE PRINCIPLES OF CHINESE LAW AND EQUITY¹.

AMID the excitement caused by the Russo-Japanese war, the notices which last summer appeared concerning projected reforms in the administration of Chinese law attracted but little attention in England; yet the subject, which is rapidly developing, may be fraught with tremendous consequences in the near future. A Chinese imperial decree of April 24 last recites how the throne has been advised to recast some of the laws in accordance with the spirit of the age, and how it has been resolved to abolish at once the cruel lingering punishment of hacking the body. It is apologetically explained that the Manchus, previously to their assuming control of the Chinese Empire 250 years ago, knew no punishment severer than simple death; but that, 'contrary to their own merciful inclinations,' they had been induced to take over this and other exaggerated forms from the laws of the preceding dynasty. In future, therefore, decapitation and strangulation, either immediate or after a period of revision and delay, are to be the only death punishments; the branding of criminals on the face, the exposure of decapitated heads, and the decapitating of dead bodies in the case of criminals not taken alive, are also abolished. A later decree foreshadows the abolition of torture during trial; and apparently this is intended to disappear too, for on July 18 one of the stipendiary magistrates at Peking was dismissed from his post by the Emperor for disobeying the new law in a civil case brought before him.

The chief mover in the above-mentioned reforms was Wu Ting-fang, who came prominently before the European public as Chinese Minister at Washington during the 'Boxer' troubles of 1900-1, and who has since then been the holder of a high post at Peking, and one of the Dowager-Empress's right-hand men. It may not be generally known that this distinguished official is an English barrister who was called to the Bar at Lincoln's Inn a little over twenty-nine years ago, that is to say, on January 26, 1877: during the year 1876 he sat at the feet of Sir James Stephen, who was then lecturing on Criminal Law; and his name still stands in the Law List disguised as 'Ng Choy,' which is simply the Cantonese pronunciation of his unofficial appellation. He was originally

¹ Delivered in substance as a lecture at the Royal Institution of Great Britain on the 16th of January, 1906.

educated at one of the English schools, I think St. Paul's College in Hongkong, to which colony he returned after call to the Bar; and, after practising there for a few years as a barrister, was offered by the Viceroy Li Hung-chang a post as legal adviser at Tientsin. Thus it will be seen that a humble local origin is no bar in China to a man's gaining the highest position at Peking; and that, indirectly, an English schooling and an English legal training have been in a measure at the bottom of Chinese legal reform. In November last another decree transferred Wu T'ing-fang from the Board of Trade to the Board of Punishments, where he will doubtless do excellent work in reforming the Code.

Two memorials from the Board of Punishments to the Throne have already set about reforming the laws on robbery with violence and providing funds for the proper conveyance of prisoners and witnesses at the public expense: in this connexion the laws of England, France, Germany, and Belgium are compared, and reference is made to the Chinese code laws which prevailed 500 and 1,000 years ago.

The fact that Chinese law is in need of practical reform in no way involves the admission that China is devoid of a legal history and equitable principles; nor must it be forgotten, when we criticize Chinese severity, that until ninety years ago Englishmen guilty of treason were cut down from the gallows whilst alive, and had their entrails taken out and burnt before their eyes: women were burnt alive for treason until 1790; and even until 1870 men convicted of treason were supposed to be quartered after execution. Until William the Fourth's time, highwaymen and other notorious criminals were gibbeted in chains and handed over to surgeons for dissection; and the late Mr. Justice Fitzjames Stephen, in his Digest of our Criminal Law, himself alludes to the atrocious severity of our former larceny laws: hanging for sheep-stealing, for instance, was common enough in Dr. Johnson's time. I believe I am correct in saying that up to the beginning of the late Queen Victoria's reign there were 200 offences for which a man might be hanged; and even now our floggings, though rare, are as brutal and torture-causing as any flogging the Chinese ever administered, and can only be justified on the grounds upon which the Chinese justify themselves. We must therefore make reasonable allowances for other nations; and in any case it must be conceded that a peaceful industrious civilization, containing within it such enormous powers of passive resistance to foreign aggression as China does, necessarily possesses many an occult virtue the secular value of which our own ignorance may have hitherto failed to bring properly to light.

As a matter of fact China possesses a very extensive and perfectly consecutive legal history: throughout all the changes of dynasty appeal has been made unswervingly to the same ancient principles, and there has been almost no borrowing at all from foreign sources. The foundations of existing legal principle are nearly all to be found in the old classical literature,—the same literature which suggested to Confucius, and to the other Chinese philosophers and legists both before and after him, the various types of political religion: in fact, ritual, law, and religion are simply different expressions of the single all-pervading principle of filial piety, which is the kernel or root-motive of all Chinese ethics.

Sir James Stephen has pointed out that, even in our own time, the conception of the word Law as meaning nothing more than *a series of sovereign commands* is only gaining ground very slowly. A 'command,' and a 'sanction' wherewith to enforce the obligation born of that command, are the precise definitions laboriously worked out by the great jurist Austin. This idea is clearly brought out from the very beginning of Chinese legal history, except that the automatic sanction and the command of nature seem to form at first one indivisible unit. Sir Henry Maine, in his *Ancient Law*, has pointed out that Austin fails to provide us with a motive for command; but the Chinese view that all government must accord with the smooth workings of nature supplies the missing motive. 'Punishment laws' rather than 'laws and their punishments' is the idea as conceived by the Chinese mind. But the most original thing of all to our European minds is the inseparable connexion between making war and enforcing the law: under the head of the 'greatest punishments' come making war and putting to death; the 'secondary punishments' included castration, cutting off the feet, slicing off the knee-cap, and branding; the 'minor punishments' flogging and the bastinado. The object of law was to keep the feudal states in order, to make officials do their duty, and to restrain the people from excess. Thus it will be seen that the Chinese conception of law is pre-eminently criminal law. The Emperor as sole lawgiver is the Vice-gerent of Heaven, and it is his duty to govern directly and through his agents in accordance with the harmonious order of nature: if he fails to do so, and persists, he is liable to be overthrown. The law of nature is that life perishes in the autumn; hence that has always been the time for executions.

Unjust judgments shock the smooth workings of nature, and call down various disasters. So far as man is concerned, his five natural relations are those of subject, father, husband, brother, and friend. But, so long as the Emperor governs with reasonable

integrity, he is entitled to the absolute obedience of all his lieges. The Emperor is to the State on a large scale exactly what the *paterfamilias* is to the family on a small scale, the function in either case being that of maintaining order. Our saying 'Spare the rod and spoil the child' is therefore well expressed in ancient Chinese by 'The lash may not be relaxed in the family, nor punishments in the State, nor arms in the Empire.' The laws are compared to the bit and the rein; to the axe for lopping off evil growths; they are the supports of academical teaching, like the stings used by insects for self-protection; beginning with war and ending with rules of propriety; instruments for maintaining an even level; and so on. The government in no way interferes with the management of the family; on the contrary, the whole resources of the State are placed at the service of each family-head, on condition of his being politically responsible in return for the loyalty and order of his family. The whole Chinese administrative system is based on the doctrine of filial piety, in its most extended signification of duty to natural parents and also to political parents, as the Emperor's magistrates are to this day familiarly called. China is thus one vast republic of innumerable private families, or petty *imperia*, within one public family, or general *imperio*; the organization consists of a number of self-producing and ever-multiplying independent cells, each maintaining a complete administrative existence apart from the central power. Doubtless it is this fact which in a large measure accounts for China's indestructibility in the face of so many conquests and revolutions. The very name for 'the Government' is still the 'State Family'; and the very name for 'the people' (of China) is still the 'Hundred Surnames.' The function of the *paterfamilias* is to maintain harmony in the family; that of the Emperor to preserve order amongst the mass of families: evil rule outrages the inspiration, or, as the Chinese call it, the 'benign afflatus' of nature, and calls for correction; failing which the Five Elements go wrong. Hence there is really no human 'command'; the sanction of outraged nature is automatically applied by nature's executive officer, the Emperor.

The Chinese idea of law thus being castigatory, it is not to be wondered at that there is no science of civil jurisprudence in the European sense. Moreover the executive and the judicial powers have always been wielded by the same hand. All matters of what we should call Family Law are left entirely to the family or clan; the government in no way concerns itself—at least so far as taking the initiative goes—with births, marriages, deaths, burials, adoption, legitimacy, divorce, mourning, testamentary dispositions, division

and transfer of property, joint ownership, mortgages, sanitation, medicine, midwifery, sobriety, or morals; so long as these matters proceed in a normal way, and do not infringe the interests of the Board of Revenue, the licence laws, the principle of ancestral continuity, the currency laws, the revenue laws, and, above all, the Five Cardinal Relations. These are all questions for the family council, and it is only on the comparatively rare occasions when the council actively and spontaneously seeks the assistance of a court that the officials take cognizance: even a murder may be quietly ignored if the clan concerned decides not to complain. In the same way, commercial jurisprudence lies within the private ken of the different trading guilds; banking questions are decided by the marvellously close and effective organization of bankers; junkmen, fishermen, pawnbrokers, post-offices, squatters, money-lenders, doctors—in short, all industries—manage their own affairs and pay the fees with the minimum of government interference, if any; and even then the official action is taken in the interests of public order rather than to assert a legal principle: and although a few laws concerning marriages, inheritance, land transfer, usury, brokerage, &c., are laid down in the codes, these rather express what is the universal custom than impose any fresh ‘command.’ There is, strictly speaking, no contract law at all except as touches the supreme contract of marriage. Thus, take the rate of interest that pawnbrokers may charge, and their licences; or the permits to sail in and out of port: in the one case the needy classes are protected from extortion; in the other travellers are protected from pirates. Should it happen that any family or any industry see fit to claim the sanction of a court of justice, it does not at all follow that such court would announce, still less create, a law for itself: on the contrary, it would do exactly what our courts do, and what they did to a greater extent before statute law largely replaced common law—it would declare the law, or adopt the customary law, local or general, as ascertained on evidence. This is only another way of saying that in most matters China is governed by the customs of ancestors, or common law; that the common law is administered by the people themselves; and that the State (unless when specially invited) only steps in to prevent a breach of the peace, such interferences rarely extending beyond persons holding official rank for any other reason than this last. It is a question whether liberty in any country, even in our own, has ever advanced beyond this stage. An eloquent prelate about twenty years ago created some sensation by his remark in the House of Lords that he would rather ‘see England free than England sober’: there is in the same way a certain free trade in

morals and religion in China (except where the ancient filial and ancestral duties are concerned), and her rulers have always preferred to 'see China free than China educated,' so far as interference with family life is concerned.

According to cherished tradition—which, however, the best-informed Chinese do not take too seriously—the most ancient monarchs maintained order by inculcating the principles of propriety, only introducing punishments occasionally: even then it was usually found sufficient to imagine the punishment, and to attire prisoners in a singular garb supposed to correspond with this or that penalty: thus those by way of being branded wore black hats; those to be deprived of their noses red trousers; those condemned to sliced knee-caps, black coats; those to be castrated, coloured shoes; those to be decapitated, petticoats and no collar; and so on. From the very earliest times banishment was resorted to. Under extenuating circumstances the principle of ransoming punishment for a money payment was admitted; and to this day the same thing is allowed, at least in theory, though in practice it has a good deal fallen off. But even so far back as 230 B.C. a well-known Chinese philosopher, who took a pessimistic view of human nature, exposed in his chapter on Law the fallacy of this view of ancient leniency: he said:—

'It is evident crime went on then as now, else there would have been no prisoners liable to these severe nominal punishments. The principle is a false one, moreover. If you are going to abolish death for murder, and mutilation for injuries done, how are you going to make the people dread? The great thing is to prevent crime; to condone it is to nourish wrong-doing. All this nonsense about pictorial punishments is but a latter-day protest against the cruel and capricious excesses of modern times. Rewards for good, punishments for evil, the principle is the same; uncertainty and inconsistency are the only bane. Consequently a good government is always a strict one, and a bad government is always a lax one. The real meaning of the much-quoted ancient tradition about pictorial chastisements is that punishments were always figured or pictured after the *tao* of Heaven.'

Here we have a Chinese philosopher, whose works are still extant, laying down 2,200 years ago what is practically Jeremy Bentham's doctrine of pleasures and pains. He also alludes to the principles of justice recommended by the great Taoist apostle Lao-tsz who lived three centuries before him, and in such a way as to suggest that he must have been familiar with Lao-tsz' writings.

Although competent critics are agreed that precise dates in Chinese history cannot be ascertained further back than 841 B.C., there is no reason to doubt the main facts recorded in their chronicles,

especially when these same facts are persistently cited in various connexions, in works of different classes, and by each successive dynasty. Thus about 950 B. C., 150 years after the establishment of a new dynasty, but when times had become degenerate once more, the Emperor decided that law reform was necessary in order to maintain proper order amongst 'the hundred families,' as the Chinese people are still collectively termed. Dr. Legge gives a full translation of this ancient code in the fifth section of his Chinese Classics (History Book, or *Shu-King*). As to the second historical code, during the lifetime of the rival philosophers Lao-tsz and Confucius, that is towards the end of the sixth century before Christ, at a time when imperial China was about to break up into a collection of warring vassal states, the prime minister of one of these states, who was a near relative of the reigning duke, and also an intimate friend of Confucius, for the first time in history had the laws cast in metal for the information of the people. The premier of a neighbouring state disapproved of this action as a dangerous innovation calculated to make the ignorant people look to the fixed letter of the law instead of abiding by the ancient principles of propriety, as declared on the merits of each case after each case had occurred; in other words, instead of accepting the *themis*, *diké*, or inspired judgment of the magistrate. Even the radical philosopher Lao-tsz had always preached the doctrine of keeping the machinery or 'implements' of State concealed from the vulgar eye; and in this particular instance he was supported by Confucius, who argued that the standard of right and wrong would henceforth infallibly be transferred from the ruler's conscience to the written law. He was full of admiration for the innovator on other grounds, but not on this one; and he outlived him seventeen years. This event of defining the law publicly was considered so important that dates were at that time occasionally calculated from the 'year of the casting of the laws'; just as the Romans used to count juridically from the 'year of the Twelve Tables,' which were cast or engraved upon metal about eighty years later than their Chinese prototype. These laconic Western laws, the written foundation of Roman jurisprudence, just as the Chinese tripod laws may be termed the remote basis of existing Eastern codes, exemplify very plainly the two different casts of mind in East and West. The Roman laws dealt with proceedings in a civil suit; action by wager; slavery for debt; the absolute power of fathers over children and slaves; inheritances, testaments, women's position, and tutorships; ownership, prescription, and transfer; easements; crimes against person and property, the *lex talionis*, lampoons, the rate of interest, and false

Tsz-
ch'an's
Law Code.

Shuh-
hiang of
Tsin.

witness; appeal from the judge to the people; cost of funerals; caste marriages; pledges for sacrificial debts, and so on. Nearly all these matters were either abandoned to the jurisdiction of the family, or were ignored by the earliest Chinese legislators, though several of them find a place in later codes. So far as we can judge by more modern categories of the quality of ancient Chinese offences, they seem to have been in the great majority of cases treason, robbery, theft, arson; or official pilfering and bribery; and the only questions for the judge were whether to execute, mutilate, or flog; for the ruler how to secure justice, see that the punishment fit the crime, and stave off Nature's wrath by making it the interest of his judges to be just. In those days there was a popular saying that 'coffin-makers always like a plague,' meaning that 'the policeman likes a good case'; and in the same way it was argued that if the central government, in its anxiety for tranquillity, encouraged those local authorities who exhibited the greatest zeal in securing convictions, the inevitable result would be to discourage the upright men who worked honestly for the people's interest. As with our own law, no child under seven years of age could be held guilty of or be punished for a felony: this merciful provision was extended by the ancient Chinese legislators to old persons of eighty and upwards.

There were two other prime ministers of the fourth century before Christ who made for themselves lasting reputations as legislators. One instituted a new land system, very like that ^{Li K'wei} proposed for China by Sir Robert Hart two years ago, under ^{of Wei.} which every available acre was worked out for adequate but fair taxation. He also collected into six books or main heads all that was best in the laws of the different feudal states, and composed therefrom a work styled the 'Legal Classic,' which may be compared with the Roman Institutes of Gaius discovered at Verona nearly a century ago by Niebuhr. Most of these Chinese laws were connected with robbery, the lighter offences being roguery, getting over city walls, gambling, borrowing, dishonesty, lewdness and extravagance, transgressing the king's commands, &c. This work was carried to the powerful kingdom which 150 years later conquered the whole of China by a young man who, like an ancient Bismarck, reorganized, developed, ^{Wei Yang} and became premier in that kingdom, where it was adopted as ^{of Ts'in.} a kind of code, but with considerable additions in the direction of cruelty. It is really this code which, in a modified form, is at the root of all later Chinese law of the positive kind. In spite of his great services to this rising State, the chancellor in question made enemies by his unrelenting thoroughness, and was in the end put

Shên Puh-hai. to death on the accession of a new king he had offended whilst yet a mere prince or heir-apparent. The other man is often called the 'Chinese Draco,' on account of the extreme severity of his laws; in addition to which he was a philosopher of the Taoist school; and, indeed, at this time there can be no doubt that such precise philosophical notions as the Chinese were beginning to have upon the political branch of law were drawn from the stern and radical Lao-tsz rather than from the courtly and conservative Confucius: but that does not mean very much, for it was then the complaint of both these philosophers that men went on fighting for power and personal interest, totally oblivious of the prophets who were crying out in the wilderness for man's salvation through propriety and right.

Han Fei-taz. Yet another Taoist philosopher and severe lawyer (who has left some of his works behind him) sought office under the same powerful revolutionary State one century later than the above two events: this was just when the conquest of China was beginning; but the jealousy of the then chancellor of that rising kingdom, who poisoned his guest and rival, prevented the lawyer in question from having any permanent practical influence upon China's destinies. It is curious to notice, however, that most prime ministers of minor kingdoms were introduced from other states; and this fact may possibly have something to do with the modern rule that no civilian can serve in his own province.

Li Sz.

All that has preceded refers to the period anterior to the great revolution of the third century before Christ, to the destruction of literature in 213 B.C., and to the founding of centralized absolutism much as it exists to-day. In those good old days, though the punishments were cruel, there were none of the more modern lingering tortures; nor were relatives of a criminal punished with him, though it appears that in very ancient times at least a threat of this kind had been made. Doubtful cases were tried in public, and the benefit of doubt was conceded. Moreover, even mutilations were coupled with, or excused by, a kind of compassionate utility: thus the branded were made gate-keepers; those deprived of a nose sent to serve as frontier pickets; those without feet, and therefore unable to chase, looked after valuable wild game as park-keepers; those whose virility was cut off tended the female apartments; whilst the un mutilated convicts performed gang-work. It was one of Sir James Stephen's favourite sayings in 1876 that, as material civilization advanced and we became more comfortable, men grew less and less inclined to make their fellow-creatures, and even their animals, more miserable than was absolutely necessary. Without in any way attempting to palliate cruelty, I may point

out that in primitive conditions it is difficult to make wrongdoers more uncomfortable than ordinary folk without causing pain or shame. A naked savage cannot be deprived of anything but the means of gratifying his appetites. Only twenty-five years ago the Foreign Office called upon His Majesty's Consul at Canton for some remarks about torture, and these remarks are still on record in the China Department. They were in effect:—

'When a free man lives in a putrid atmosphere on repulsive food, eaten up by vermin, his body notched and distorted by painful labour, without comforts, pleasures, or distractions of any kind, as indeed from our point of view actually do the majority of the Chinese poor, it is difficult to make a prison more uncomfortable for the convict than is his own house, except by imposing still greater discomforts than he is born to upon his person and freedom of movement.'

But there are abundant maxims and sayings, notwithstanding, that prove the existence of merciful feeling in the ancient rulers. One, quoted century by century to this day, was: 'Rather let a rogue escape than risk killing an innocent man.' Whilst moderate justice was considered appropriate for a normal political condition, it was held a good political maxim to apply the law in a simpler and easier way when new systems of rule were being introduced; and, on the other hand, it was a wise precaution to be exceptionally severe when the State showed signs of anarchy. Perhaps the oldest maxim of all is: 'In punishment be intelligently compassionate.' In hopelessly degenerate times the radical philosopher Lao-tsz was in favour of the fewest and simplest laws; but he insisted on prompt, secret, and effective application of punishment by properly qualified officials. Confucius (a little later) has left several striking remarks on record. He says: 'As to convicts, I go with the rest; we must necessarily condemn, if only in order to avoid condemning still more of them later on.' Again, 'The ancients understood better than ourselves the art of preventing crime; now the best we can do is to avoid punishing crime unjustly. The ancient magistrates always hoped to save a prisoner's life: now we seek to prove it forfeit. Better let a real criminal go free, however, than slay an innocent man.' 'I allow one generation to a new dynasty for the gradual introduction of benevolent rule, and I allow a hundred years to abolish killing and mutilation altogether.' 'A benevolent ruler must have courage too; his rectitude manifests itself in preventing crime.' 'Unjust punishment damages the administration, and a bad administration touches each man's person.' 'Government must strictly execute its own terms.' Two centuries later than Confucius, Mencius has a few

remarks to make: he allows considerable latitude, and even indulgence, to a ruler so long as that ruler keeps in sympathetic touch with his people; but he says, 'No truly benevolent ruler will slay an innocent man, even to make secure his own rule.'

The great Chinese revolution of 2,100 years ago introduced several new crimes as well as many monstrous punishments. The chief intellectual agent in it was the chancellor, mentioned above, who poisoned his visitor. It was at his recommendation made an offence punishable with death to conceal books, or to own any except the few agricultural and scientific works which were not on the 'Index Prohibitory'; fearful tortures were introduced, and three generations of relatives were involved in one man's political crime. The name for 'Emperor,' now still in use, was then first introduced, and a homogeneous system of administration in all important matters was effectively established all over China. But though this powerful innovator was an able man, his methods were altogether too tyrannical, and after his death in 210 B.C., and then after eight more years of very chivalrous and picturesque fighting, a new and permanent dynasty was founded on practically the same lines: ever since that things have remained very much in *statu quo*, even down to our own days.

In accordance with one of the ancient politico-legal maxims just mentioned, the new dispensation began by abolishing the whole network of harassing law, and by enacting three simple rules for the orderly government of the Empire; to wit, death for homicide; compensation and imprisonment for wounds and robbery; all else being left to the people themselves. This was called the 'Tripartite Bargain with the Elders of the People,' and the 'all else left to the people' still holds good, whether intentionally or no, in a measure to this day. The frank and tactful geniality of the new ruler's personality has probably more to do with the credit his memory still enjoys than the intrinsic wisdom of his summary legal methods; but, however that may be, his 'three short rules' have established a reputation in China little short of that achieved by King John's Magna Charta amongst ourselves. But the Chinese are and always have been very grateful to their rulers for small mercies, and they have always been found ready to idealize any gracious sovereign acts. The Emperor, under the guidance of an astute chancellor, rightly refrained from introducing new measures, and was probably only giving fuller effect to ancient laws and customs when he granted this short charter; which was apparently all that King John did, except that, unlike the Chinese ruler, the English king had only the grace to do it under compulsion. The vicarious punishment of relatives

Ts'in Shi
Hwang-ti.

Han Kao
Ti.

Siao Ho.

was abolished, but official superiors and witnesses were obliged to denounce offenders. But the much-vaunted three simple rules were soon found insufficient for practical use when things quieted down; when the sword gave way to the ploughshare; and when the new dynasty felt secure in its power. The chancellor in question, who (as also his successor in office) professed the 'masterly ^{Ts'ao} inactivity' principles preached 300 years before that by the great ^{Ts'an} Taoist philosopher Lao-tsz, found it necessary to re-introduce vicarious punishments for treason, and to select as many of the general laws of the revolutionary dynasty just ousted as were suited to the people's old traditions, and also to their changed position; he proceeded to construct therefrom a code in nine heads (being in effect the six heads of the 'Legal Classic' plus three new ones), which code, subject of course to extensive alterations, has from dynasty to dynasty always served as the basis of Chinese law; just as the Corpus Juris of the Christian Emperor Justinian forms in a way the practical basis of European law as a whole, affecting indirectly even the English and Scotch statutory laws, and in some instances the decisions under our common law. We have already seen that revolutionary China had borrowed its Institutes of Law from an active legal author in one of the feudal states; and thus we have an unbroken historical chain extending back from our own time for about 3,000 years, with no admixture whatever of foreign notions, or, at all events, of foreign law. The revolutionary law against concealing books was abolished by the founder's son, and literature was soon restored to its former influence, after a quarter of a century of extinction.

Now we come to a very prominent turning-point in Chinese legal history. The founder, his usurping empress, and his strictly legitimate son by her had all passed away; the obnoxious law against concealing books had, as we have said, been repealed, and another son, born in less honourable wedlock, sat on the imperial throne. On account of his calm, philosophic, and humane temperament, he ^{Han Wên} is often styled by Europeans the Marcus Aurelius of China. His ^{Ti} first act was to issue the following edict: 'Enforcements of the law are executive acts the object of which is to prevent violence and assist the well-disposed: to visit the sins of convicted criminals on innocent parents, spouses, brothers, sisters, and children seems to me most unreasonable. I wish for a report.' His counsellors, after due deliberation, advised that it had hitherto been found good policy to make people feel uncomfortable in advance, by visiting upon them the sins of their kinsmen after crimes committed, and that it would be better not to make any change. A second decree ran: 'When the law is meet, the people are honest;

when punishment is appropriate, the people accept it without murmur. Moreover, officials are supposed to act as guides: if, instead of guiding the people, they punish them irregularly, they become tyrants. I wish for a further report.' On this the counsellors gave way: 'Your Majesty's merciful will covers far more ground than we can presume to understand the necessity for.' To illustrate the continuity of Chinese history, it may be mentioned that this edict of 2,100 years ago is still on record; is quite intelligible to modern ears; and still forms part of the stock legal diction, just as does the celebrated declaration of the English barons upon the subject of legitimacy: 'We will not change the laws of England which have hitherto been accepted and approved by our ancestors.'

But, if we inquire closer into Chinese history, we find that this picturesque event is another case of idealizing: not to mention his grandson and most illustrious successor, whose financial straits and palace intrigues led him to enact many hasty and cruel laws, that very 'Marcus Aurelius' himself was, during a subsequent rebellion, unfortunately induced to depart from his own noble principles. There was, however, one other *cause célèbre* during the reign of this humane Emperor: it happened after he had been on the throne for nearly twenty-five years, and the anecdote is as well known in China as the story of Brutus and his condemned sons Titus and Tiberius is known in Europe. A Chinese physician and local official was summoned to court for peculation, a crime which rendered him liable, under the new code as under the older ones, to the penalty of mutilation: having five daughters, but no son, he bewailed the luckless fate which deprived him of a representative capable of sacrificing himself upon the altar of filial duty in accordance with the maxim 'A father's debt the son repays.' His youngest daughter, stung by these reproaches, and knowing that her father was the victim of private spite, insisted on accompanying her parent to the imperial court, where she pleaded his case before the Emperor with such eloquence and effect that his Majesty at once decided to abolish as barbarous the punishment of mutilation. Hard labour at the Great Wall, shaving the head, the collar or yoke, bastinado and flogging,—these were substituted for mutilation, and really form the nucleus of the modern system.

These and similar imperial orders were, it must be confessed, often rather symptoms of growing change than definite registrations of permanent radical improvements; for, owing to China's enormous size, and to the apathy of local rulers, satraps, and magistrates, the imperial decrees, unless repeated and persisted with, seem often to have remained a dead letter, especially where only the interests of

the masses were concerned, and where no powerful influence was at work to insist on following up the order. The first of Chinese true historians (whose great work has recently been translated into French by Professor Chavannes) was himself cruelly deprived of his manhood by the grandson just mentioned of this humane Emperor, and this for the purely technical offence of remonstrating with the monarch in favour of a defeated general; and he leaves on record a pathetic letter to a friend bewailing in resigned terms his miserable fate, and characterizing himself as 'what's left from the knife and the saw.' It was this Emperor, too, who encouraged informers and delators and developed the idea of forcing out confessions under torture, a process which I cannot find to have existed in more ancient times. Still, notwithstanding the caprice or weakness of this or that ruler, the progress in the direction of reason and mercy was now fairly steady: doubtful cases were reheard at the capital; the local authorities were urged to use prompt dispatch, and not to confine people too long upon mere suspicion; steps were taken to check the bribery of officials and the corruption of clerks and police; a growing disinclination to extort confessions under the lash or rack was manifested; fasting and solemn formalities were enjoined when the time for carrying out death sentences approached; the number of bastinado strokes administered was more than once reduced along the whole line of offences; in spite of the ever-growing additions to the law categories, earnest endeavours were made to simplify the law as much as possible; and generally, it may be stated that during the 400 years of Han dynasty rule (200 B.C. to A.D. 200) a steady advance took place in the direction of mildness. For many centuries after that the question of reintroducing the mutilation punishments came up for discussion; dynasty after dynasty 'secured the stag' (as the Chinese poets say when they refer to the contests for empire); and each reigning house naturally had its own special code, but always based on the same old general principles, modified to suit the exigencies of the times. There never were any surprises or rival doctrines in China, such as our Gavelkind in Kent, and Borough-English in other parts of England, which flatly contradict the ordinary laws of descent and inheritance¹. Referring back now for light, we may be disposed to ignore the codes of the minor dynasties which only reigned for a generation, in favour of those of renowned houses which maintained the throne for centuries; but that would be a mistake: each new dynasty of course assumed (and hoped)

¹ Local rules of inheritance, &c. belong to private and patriarchal family customs which very rarely come before the imperial jurisdiction. See the present writer's 'Comparative Chinese Family Law,' 1878 (out of print).

that it would continue, so to speak, for ever—for *wan-sui* (the Japanese *banzai* with which we have during the past twelve months become so familiar) or for ten thousand years. Consequently we find that many of the most far-reaching and even best improvements were often introduced by short-lived reigning houses which only endured a lifetime or two. The general tendency of change ran in the direction of sparing life, facilitating appeals in doubtful cases, lightening the load of fetters, flogging on parts of the body less susceptible of vital injury, and sparing the modesty of females. The principle was laid down, moreover, that women were only responsible for the crimes of the family into which they married; and not of that which they had quitted. In the middle of the third century of our era there were thirty-seven groups of punishment for ordinary offences ranged under the following heads: death three, shaving four, uninjured three, hard labour three, ransomable eleven, fines six, miscellaneous satisfaction seven; and the chief heads under which offences were arranged were, as of old, robbery (not including terrorizing or trafficking in human beings), thefts, cheating, defrauding, trespassing, falsifying royal acts of state, &c. Treason was still punished by cutting in two at the waist, but responsibility did not extend to grandparents and grandchildren; for rebellion the whole three generations suffered; their bodies were pickled for exposure in the market-place, and their dwellings razed to the ground. In homicides the principle was recognized that relatives might take vengeance, but not after an imperial amnesty had been granted to the murderer. In the whole history of China I have not come across a single case of civil jurisprudence in the strict sense where any abstract rights between individuals has been threshed out with considerations touching relevancy of evidence, damage to character, equitable set-off, nice definitions in contract, and so on. All cases brought before the Crown are, so to speak, brought up by special reference, because the family or commercial court below cannot settle it and applies for assistance.

For three centuries North China was under Tartar rule, and the native dynasties for the first time had to cross the Great River (or Yangtze Kiang, as we usually call it) and fashion the best empire they could out of Chinese colonists and southern races only half Chinese. The march of law and order was about the same in both halves of China; for if the literary classes had carried part of their civilization over the river with them, the Tartars remained in possession of the old civilized soil; and thus both empires based their legal principles and humane improvements upon the same old classics and unshakable ideals. Strangling is now heard of for the first time as a death penalty; less grave than decapitation, because

the body remains undivided for reappearance in the next world: the ancient punishment of tearing the body to pieces by means of horses is formally revived by both dynastic groups. No new legal principle of any kind is introduced by the Tartars, but one or two droll punishments certainly suggest foreign origin; for instance, wizards were condemned to carry a ram on the back, embrace a dog, and jump into a pond. In China proper, though the laws against inciting the people with baseless talk are severe, I have never discovered any law against wizardry or religion. Both in the north and south the 'grievance drum' was introduced, so that persons having a grievance could call forcible attention of the Emperor and his officers to an unredressed wrong. The native procedure of the Tartar dynasties was of course quite summary, the tribe chiefs disposing of causes in a rough and ready way in front of the Khan's or sub-Khan's tent; as nomads they possessed no fetters or prisons, and being destitute of any native system of writing, they made arrests and recorded judgments by means of wooden tallies: most homicides could be ransomed with cattle and horses, like our own *weregild*; but all treasons were punished with pitiless extermination of the family. Yet just as the rude Goths at exactly the same date carved kingdoms and made excellent codes out of the débris of Roman civilization and law, so did the Tartars rapidly acquire at least a veneer of Chinese refinement; and some of their adapted Chinese codes are as much entitled to respect, when compared with the codes of the pure Chinese dynasties, as are the Edict of Theodoric the Eastern Goth or the Breviary of Alaric the Western Goth, which did excellent duty in North Italy, France, and Spain. Curiously enough, the great Chinese statesman who Ts'ui Hao. acted as premier, codifier, and historian to the Tartars of the fifth century was put to death with his three generations for telling the plain truth about the Tartar origin in his history. It is now that we first begin to hear of the characteristic Chinese punishment known to us as the *cangue*, or wooden collar, a kind of portable stocks. A good deal of the legislation consists in defining the weight and size of this instrument, the thickness and smoothness of the whip and bastinado, ameliorating the lot of prisoners, arranging the rate of ransom in copper and silk, and so on. Flogging on the back was abolished because the Emperor had chanced to see a picture of the human anatomy, and had discovered that the bowels were perilously near the spine. There is even one solitary instance in which the Buddhist desire to save life is coupled with an appeal to old classical principles as a reason for extending the system of ransoming crimes.

The second great turning period in Chinese legal history was the

seventh century of our era, when, after many centuries of interminable civil strife and foreign war, China was once more permanently reunited under a vigorous native dynasty. Even before the sixth century was out, China had been reconquered by a native house of great intelligence and energy; but excessive ambition soon led to its premature supersession. Judgments had now to be written; law students were for the first time trained; the punishment of family members was abolished; the triple reconsideration of death sentences was introduced; and, generally, some far-reaching reforms were ordered, if not actually made. The principles of Buddhism had by this time been thoroughly examined; and moreover Christianity, the Persian religions, the teaching of Mohammed, had all been introduced into China: therefore there was some opportunity to compare notes and to soften away the asperities of the old punitive codes, though it must be confessed that none of the foreign systems is honoured by the least mention. Amongst the distinguished officers who received a commission to reform the laws on the basis of the improvements introduced by the short dynasty just mentioned, but minus its severities, was one who was a strong supporter of Buddhism; and yet curiously enough he was one of those who pleaded for the retention of mutilation as a merciful respite from death. But the Emperor was firm, and from this date the ancient Five Punishments, as they have been previously described, were firmly established almost exactly as they now are; that is to say, death (decapitation and strangling); three degrees of banishment with or without flogging and hard labour to remote provinces; five degrees of penal servitude with or without flogging to places in one's native province; eight degrees of the greater bastinado, and five of the lesser bastinado; twenty punishments in all—although even so late as 1078 the question of reintroducing nose and foot cutting was unsuccessfully mooted again. Permission to commit suicide at home now appears for the first time amongst the favoured official classes. Offences were grouped under twelve heads: statutory definitions, or qualifications of the ancient statutes; protection of the Emperor; questions of official duty; marriages; imperial mews and stores; independent political action; theft and robbery; litigiousness; cheating and falsifying; miscellaneous statutory offences; deserters and escaped prisoners; trials. There were, as in ancient times, eight grounds upon which special privileges might be claimed after sentence, but not in the case of the 'ten odious crimes,' of which we now first hear. Nothing could be more unsatisfactory or indefinite from our juridical point of view than this clumsy classification, which with slight variation seems to have remained almost unchanged for 1,400 years; of course it can only

Siao Yu.

be made even partially intelligible to us by examining one by one the specific crimes ranged under each heading; but even on the face of it as it stands, it will be apparent, in spite of vagueness, that political offences occupy the chief place in the Chinese legislator's imagination, and perhaps that may be the reason why the Chinese, as a people, have always been obstinately inclined to leave politics to those whose business it is to run the machine of state, and have always managed their own private affairs with the minimum of application for state assistance: so far as I am aware, there has never been asserted a claim for popular rights beyond the mere right of being left with a bare competence for wife and family. The people of China have never 'cornered' their sovereigns.

It is to the seventh century that belongs another great principle which has possessed great vitality, and that is what we called the triple applications for a death-warrant. The Emperor, having had reason to regret the fact that he had hastily ordered the execution of offending courtiers or statesmen, gave peremptory instructions that in future his commands were to be ignored until he had repeated them three times at decent intervals extending over at least two days; so that, to use our expression, his Majesty could sleep upon his wrath: moreover, warrants for execution were not to be forwarded any longer by express messenger, the idea being that the prisoner should enjoy every possible chance of a reprieve. There are some grounds for supposing that in very ancient times this triple appeal to conscience existed in the form of a thrice-repeated pardon, the last cry of which was by a legal fiction supposed to be too late to overtake the prisoner.

A few special instances of Crown Cases Reserved may be mentioned as illustrating the concurrent effect of scriptural injunction and ever-changing legal precept in evolving the principle of a judgment, or what our lawyers call, in imitation of the Roman jurisconsults, the *ratio decidendi*. A youth deliberately murdered his father's enemy, and was, on the face of it, liable to execution. But, it was argued, the ancient Book of Rites says that a son cannot live under the same sky with his father's enemy; whilst Confucius's history asserts in general terms the duty of a son to avenge his father's wrong. The law nowhere actually lays down that such homicide is specifically excusable; if it did, it would appear to encourage murder and family feuds: still, the law is confessedly based on the general principles of the classics; hence in this case there is an apparent conflict between general legal principle and specific law. It was decided that each such case must be separately reported and judged upon its merits. Another case occurred of a youth killing a man

whom he saw in the act of attacking his father, and then voluntarily giving himself up to justice. It was argued from Confucius's history that the motive of an act should be taken into account in proportioning a sentence; here the youth gave himself up, so that escape or concealment were not in question: he therefore received a reduced punishment. In one case the Emperor had not the heart to execute a corrupt official at Canton, who at an earlier stage in his career had done him good service. The Emperor said: 'I am supposed to carry out impartially on behalf of Heaven the rewards and punishments that may be due. In this case I am afraid I am manipulating the law to the discredit of Heaven. Put up a mat-shed in the southern suburb for three days so that I may do penance at the Altar of Heaven there.' (This singular compromise with Heaven recalls the expression *colpo di stato di Domeniddio* used apologetically by His Holiness Pope Pius IX to excuse his appointment to Westminster of Archbishop Manning.) The same romantic Emperor once in a fit of generosity sent to their homes 390 prisoners whose names were down for execution, ordering them to come up for judgment after the autumn. Not a man failed, and so all were pardoned.

In another instance the Emperor declined to sanction the death of an elder brother serving at a distance when the younger brother was found guilty of rebellion: eleven hundred years later a Manchu Emperor took exactly the same step. Another Manchu Emperor had a father's enemy case on appeal brought before him, and reversed the decision of the T'ang dynasty. But in the later case the circumstances differed: a son killed the son of the *convicted* murderer of his own father; the murderer being in the hands of the law, the son had no vengeance to satisfy, for the murderer was legally dead: moreover, by killing the murderer's son, two lives were taken from one family in satisfaction of one life in the other. Hence the murdering son was sentenced to decapitation, subject to the chance of a general amnesty taking place before his name should be finally ticked off for execution. In the case of an escaped murderer who delivered himself up on hearing that his father had been arrested, a conflict of opinions arose: it was argued that at no period of Chinese law had murderers been let off death; however, the Emperor considered the man's behaviour 'closely approaching nobleness,' and respite the decapitation for banishment and a flogging. After the wars and revolution which accompanied the fall of the great T'ang dynasty there was only one copy of the laws to be found; but this was enough, and it formed the basis from which the next group of short-lived dynasties fashioned their codes. To this period belongs the abolition of confiscation of property and

of the responsibility of relatives in all cases but treason; the cleansing of prisons, medical treatment of prisoners, decent conduct towards mere witnesses, and regular tabulation of the rates of ransom; but the anarchy was too great for these important reforms to be properly consolidated; however, in any case they were symptoms of healthy progress.

A law of the year 977 made the murder by a stepmother of her husband's earlier son punishable as an ordinary homicide. In 1729 the Manchu Emperor made the offence punishable as before by strangulation if the murder deprived the husband of heirs. If the husband was dead, the stepmother must not have the privilege of ransom accorded to women, but her own favourite son, if any, must be strangled. If no son, then she must quit the family and go back to her own family, her husband's property being given to the murdered son's brothers and sons in equal shares. It is about 900 years ago that the lingering death punishment (abolished in 1905) first appears both in South China and amongst the Kitan Tartars: it seems to have been reserved for the Mongols in North China to introduce it on a regular scale.

Instead of plodding on from this point with the somewhat monotonous history of Chinese legal changes, it may be more interesting to start back from the position of to-day, and to work our way in a reverse direction to the point where we have broken off. The present Manchu dynasty has now reigned without a break for 260 years, and the very first thing the new Emperor did on his accession in 1644 was to ordain that the laws of the late dynasty—which had governed China for 300 years—should be modified so as to include Manchu customs, and should be re-issued as the *Laws of the Manchu Dynasty*. In dealing with the question of general amnesties on joyful occasions, the responsible statesmen of the day gave signal proof of the continuity of legal history by quoting the dictum of a codifier 1,050 years before them: he had asserted that 'the states which find pardons unnecessary are the states which have just laws'; he also cited a second codifier of 600 years back, who had quoted the classical saying that 'appeal to principle was sufficient for the good, even though chastisement might be the sole effective appeal to the bad man.' The Emperor in justifying what may be styled 'benefit of clergy,' or special trials in favour of officials, and the exemption of Manchus from certain punitive degradations, referred back to the eight privileges introduced about 1200 B. C., i. e. the privileges of blood, friendship, virtue, ability, service, rank, zeal, and hospitality (the last referring to ambassadors). In another instance reference was made to the plea used by the girl who tramped after her father to the court of the Chinese

Ming
dynasty,
1368-1643.

Marcus Aurelius, namely, that 'a man once judicially slain can never come to life again, however innocent he may be.'

K'ang-hi.

The second Emperor likewise made many appeals to classical principles, and, like his successor, laid down very definite rules exempting women from the necessity of appearing before the courts: all female witnesses and persons concerned in a case (provided they were not themselves accused) were to be examined on commission in their own houses. The treason laws of the present dynasty, it must be confessed, are as ferocious as they have ever been in China at the worst of times: all the odious punishments abolished by the decree of last April were in full swing when the Manchus took over their predecessors' code, and have remained so; that is to say, slicing to pieces, and decapitating the dead; besides responsibility of relatives to the third generation both ways, slavery of the women and young boys, and so on. The fourth Emperor in 1740 issued a new edition of the Manchu Code, alluding in his preface to the supposed pictorial punishments of extreme antiquity, and to the first real code of 960 B. C., mentioned above as translated by Dr. Legge. In addition to justifying several of his specific decisions in Crown Cases Reserved by referring back to the classics, the Emperor cites two cases a thousand years old, specially named in the Chinese legal records, in order to amend two decisions connected with the justifiable murder of a father's enemy by that father's son. These two cases have already been alluded to under the T'ang dynasty. The same principle is repeatedly laid down by the Manchu Emperor that was asserted by the Roman Emperors, namely, that 'though above the law, they considered themselves bound to live within the law.'

K'ien-lung.

The punishing of mandarins *ex post facto* for not having foreseen, or for not having punished, a crime is also an extension of the responsibility theory which seems to have grown up under the Manchu dynasty.

Legal activity at headquarters in China seems to have fallen off with the advent of Europeans: of course ordinary routine business has been submitted to the Throne and disposed of in the usual way; and of course special legislation—as for instance in the matter of opium—has been sometimes found necessary. Curiously enough, the falling off in Manchu jurisprudence coincides in date with the translation of the Manchu Code by Sir George Staunton, who was with the Lord Macartney mission of 1793. At present our knowledge of Chinese law, as presented to us in its most recent or Manchu form, must be in a large measure gathered from that work, which is now quite out of print; but it must be mentioned that Staunton only translated the original kernel or ancient 'statute'

part of the law, much of which is obsolete ; he left entirely untranslated what may be termed the judge-made or case-law, which really forms the most important part of the work. The close corporation of law secretaries who have quite a monopoly of the law clerkships in all Chinese courts are the real persons who manipulate the latest decrees, fashion the judgments, and hold a balance between the Emperor and his judicial officers. By them the judge-made law is really created and applied. It is another instance of a trade worked with the utmost secrecy. Even so far back as 800 years ago, it was complained that 'all law now depended on the clerks' memories.'

The legal records of the purely native dynasty of Ming, which occupied the throne during the reigns of our Houses of Lancaster, York, Tudor, and Stuart, distinctly state that all jurisprudence to their date is based upon the Nine Chapters of 200 B.C. (Han dynasty), as subsequently expanded and codified in A.D. 630 (Tang dynasty). In 1373 this Ming dynasty published its code, which is confessedly based on that of 637, and has exactly the same twelve divisions. The Mongol dynasty, which practically began, so far as China was concerned, with Kublai Khan in 1260, is much better spoken of by the historians than one would expect, considering that it was a completely foreign government ruling China by pure force. Kublai is spoken of as quite a benevolent prince from a legal point of view, and even his less capable successors are charged rather with a certain slipshod carelessness than with wanton injustice. Special features of this dynasty were the abolition of strangulation, and the creation of legislative privileges in favour of Buddhists, and at times of other priests. The Chinese both in the north and south seem to have had nearly all the benefits of old Chinese law ; but the Mongols, mostly of course military men or officials, were under a special dispensation. For three centuries previous to the Mongol conquest, China was under two concurrent governments, that of the Tartars in the north, and that of the pure Chinese dynasty in the south : the space at our disposal will not permit of our saying more than this : the whole legal history is on record ; progress can be traced step by step ; and no considerable departure was at any time made from the accepted principles handed down from ancient times. A celebrated novel, so immoral Kin-p'ing-mei. that even in China it is prohibited, gives a powerful and vivid account of the corruption of those days.

On the whole it may be said that the southern dynasty was as shifty and as merciful in laws as it was literary and unusually weak in arms. But officials were now obliged to study the law, and scholars began for the first time to hold judicial posts. For fifty

years previous to this north and south rule, China was split up into innumerable contending local dynasties, and it need hardly be said that during this welter of anarchy no startling advance was made: yet each dynasty—at least each of the five successive central ones, which are the only ones usually recognized by standard historians—naturally took for granted the possibility that it might endure forever; and thus the very first step taken by each founder was to issue a code of his own, based, of course, upon the old codes already described.

Previous to that the great T'ang dynasty, as we have stated, ruled the whole of China with great glory for 300 years, these 300 years roughly covering the period of our Saxon kings: the legal history is very minute, and the special decisions are both amusing and interesting: as already stated, some of them are quoted at this day, just as medieval authorities may be quoted here. So great was the reputation of the T'ang dynasty, that in the south of China to this day the Cantonese invariably describe themselves in colloquial speech as 'men of T'ang.'

On the other hand the general name for Chinese in the north is 'men of Han,' 'language or writing of Han,' and so on, having reference to the glorious period described in the earlier part of this paper, that is from 200 B. C. to A. D. 200, when three successive branches of the Han family sat upon the Chinese throne. During the 400 years between A. D. 200 and 600 China was ruled by Tartars in the north and native houses in the south: there is plenty to say about legal development in both, but this is not the place for saying it.

To sum up, the two great law dynasties of China are the Han (200 B. C. to A. D. 200) and the T'ang (600 to 900), and they alone of all purely Chinese dynasties (i. e. not counting the Mongols and the Manchus) succeeded in extending Chinese influence to Persia and India: hence to this day the pure Chinese are proud to call themselves 'men of Han,' and 'men of T'ang.' It is singular that the wife of the first Emperor of the Han dynasty was a usurping Dowager after his death; one of the second-class wives of the virtual founder of the T'ang dynasty married his son, and was also a usurping Dowager after that son, her husband's, death; and, finally, at this moment we have an imperious lady of the same character as her predecessors of 200 B. C. and A. D. 700 practically reigning for fifty years and setting aside her son and her nephew. Thus, although what we call the Salic law has always been in vogue, and no woman can ascend the throne of China, yet at intervals of about a thousand years three Empresses-Dowager have ruled with firmness if not distinction, and their rule has in each case coincided with important law reforms.

EDWARD H. PARKER.

THE CONSTRUCTION OF THE MONEY-LENDERS ACT, 1900.

THE first section of the Money-Lenders Act, 1900, has conferred on the Courts a somewhat anomalous jurisdiction, and much doubt yet remains as to the principles on which that jurisdiction is to be exercised, but the recent decision of Channell J. in *Carringtons Lim. v. Smith* ([1906] 1 K. B. 79)—if affirmed by the Court of Appeal—should at any rate prepare the way for a more complete definition of the precise meaning and scope of the enactment.

The history of the previous decisions on the section is a somewhat curious one. In *Willon v. Osborne* ([1901] 2 K. B. 110) Ridley J. held that the words 'harsh and unconscionable or otherwise such that a Court of Equity would give relief' meant merely so harsh and unconscionable that a Court of Equity would have granted relief apart from the Act—in other words, that the section was merely declaratory of the existing law. This case was followed by Channell J. in *Barnett v. Corunna* (The Times, June 16, 1902). In *In re a Debtor* ([1903] 1 K. B. 705), however, the Court of Appeal overruled *Willon v. Osborne*, and held that the power to grant relief under the Act is not confined to cases in which Equity would have granted relief prior to the Act, and Cozens-Hardy L. J. expressed the opinion that the rate of interest charged might be so high as of itself to constitute evidence that the transaction was 'harsh and unconscionable.' The Court of Appeal in this case was dealing with a decision of the Registrar in Bankruptcy, who, following *Willon v. Osborne*, had refused to grant relief merely on the ground that the rate of interest charged was a high one; they remitted the case to the Registrar for further consideration, but abstained from deciding either what rate of interest is to be considered 'excessive,' or what meaning is to be attached to the words 'harsh and unconscionable.' In *Saunders v. Newbold* (20 T. L. R. 620) Kekewich J. held that 'excessive' means excessive in proportion to the risk incurred by the lender, and his decision was on this point affirmed by the Court of Appeal ([1905] 1 Ch. 260, cf. *Part v. Bond*, 93 L. T. 49). In *Poncione v. Higgins* (21 T. L. R. 11), Romer L. J. said that 'it would be mischievous to formulate what conduct on the part of the money-lender was harsh and unconscionable within the words of the Act.' Until the decision in *Carringtons Lim. v. Smith*,

it might, therefore, well have been doubted whether the result of the cases was not to establish the following propositions: (1) that 'excessive' means excessive in proportion to the risk incurred by the lender, and that in determining whether interest is excessive, it is necessary to look rather at what it would have been reasonable for the borrower to pay than at what he in fact agreed to pay; (2) that the rate of interest may be so excessive as of itself to justify the Court in setting aside the transaction as 'harsh and unconscionable'; (3) that no general definition of the meaning of the words 'harsh and unconscionable' can be, or ought to be, framed by the Courts, but that each individual case is to be left to the unfettered discretion of the judge who tries it. If these propositions correctly represented the present state of the law, the result could hardly be said to be very satisfactory. As pointed out by Channell J. in *Carringtons Lim. v. Smith*, if judges are empowered to fix a maximum rate of interest, the usury laws would in effect be re-established. Moreover, the validity of all transactions with money-lenders would remain doubtful until tested by judicial decision, and the inevitable differences in point of view arising from differences of training and temperament in the judges, would, in the absence of any fixed principles, immensely increase this state of uncertainty. And in this connexion it may perhaps be said that there are already indications of some divergence of opinion between the Chancery and Common Law Judges as to the manner in which the Act is to be applied.

In *Carringtons Lim. v. Smith*, however, Channell J. expressly repudiates the doctrine that every judge is to be a law unto himself as far as the Act is concerned. He says, 'I think, however, that the words of the Act do of themselves show quite clearly that an effort has been made (possibly without much success) to define the transactions which the Court may reopen. There seem to me to be clear indications that it was not intended to give jurisdiction to a judge to reopen transactions merely if in his individual opinion too much interest had been charged. Further, I think any Court ought to lean against any such construction of an Act of Parliament. The function of a judge in this country, and I should think in all civilized countries, is to ascertain and declare the rules of law (or of equity as distinguished from law), and to decide the rights of the parties before him according to those rules, and not according to his own idea of abstract right or justice. When, before the Judicature Act, a bill was dismissed for want of equity, what was meant was that the suitor had not brought the case within the rules according to which the Court of Equity gave relief, and not that there was no abstract equity or justice in his case. It would, in my opinion, be

mischievous in the extreme if the Legislature were, even in a limited class of cases, such as those between money-lenders and borrowers, to give the judges jurisdiction to decide cases without some definite rule to go by, and I do not think they have done it, although in the Act now under consideration there is considerable difficulty to find the rule.' The facts as found in this case were that the parties negotiated on equal terms, the nature of the contract was thoroughly understood by the borrower, who was a business man, and the rate of interest was 75 per cent. per annum. The risk incurred by the lender was in fact small, but there was no evidence that he knew, or ought to have known, how safe the matter really was. On these facts, Channell J. decided that, in considering what rate of interest is to be deemed 'excessive,' 'having regard to the risk and all the circumstances of the case,' the risk is not to be taken as the only criterion, but that among the 'circumstances' to be considered the most important is—at any rate in the case of a loan without security—what rate a borrower, who 'has thoroughly understood all the transaction and knows all the facts of the case much better than the Court can possibly do,' and who is under no particular pressure, has been quite willing to pay; and he held that under such circumstances the rate so agreed cannot be said to be 'excessive.' The judgment is thus based on the construction of the word 'excessive,' but the learned judge added that he could not see how on the facts the transaction could possibly be said to be harsh and unconscionable. Whatever might come within the true meaning of those words as used in the Act, they certainly did refer in some way to the conduct of the money-lender.

The decision thus supplies some basis for a definition of the term 'excessive,' and is also an authority for the proposition that the words 'harsh and unconscionable' are at any rate susceptible of judicial definition.

With regard to the former question it is suggested that the following rules may be deduced from *Carringtons Lim. v. Smith*: (1) Where the parties contract on equal terms and the loan is without security, no rate of interest, which the borrower has voluntarily agreed to pay, can be regarded as excessive. (2) Where security is taken, the Court may also consider 'the market rate' for loans on similar security and may perhaps be entitled to hold the rate charged excessive, even though the parties contracted on equal terms, and the borrower voluntarily consented to such rate (cf. *Part v. Bond*, 93 L. T. 49, where, however, there was evidence that the borrower was not fully capable of protecting herself). (3) If the parties do not contract on equal terms, the Court will, of necessity, have to apply an objective standard in determining the question, and the

extent of the risk as known to the lender will be the most important fact to be considered.

As stated previously, the following words in the section, 'and that, in either case, the transaction is harsh and unconscionable,' have not as yet been judicially construed. It is submitted with hesitation that some assistance may be obtained from an examination of the equitable doctrine under which relief was granted to expectant heirs. It is true that in *Re a Debtor*, Romer L. J. stated that these words 'ought not to receive a limited or artificial meaning by reference to the rules of equity before the Act,' and that in *Saunders v. Newbold*, Kekewich J. said, that 'he understood that the object of the Legislature was to get rid of the fetters which by tradition had been imposed upon the Court of Chancery, or which the Court had imposed on itself, in reopening transactions which might be more or less harsh and unjust. The discretion conferred upon the Court by section 1 of the Act was extremely large, but he thought the construction of the section was reasonably clear, and that it was impossible to limit it in the manner which had been suggested by the plaintiff to cases in which the Court of Chancery would formerly have interfered. He was, however, relieved from all difficulty by the decision of the Court of Appeal in *Re a Debtor*.' But it must be remembered that at the time the Act was passed it was—as will be shown hereafter—at any rate doubtful whether the doctrine of equity had any application to persons who did not fall within the class of expectant heirs, and it is possible that Romer L. J. and Kekewich J. merely intended to emphasize the fact that the scope of the Act is not—as was supposed prior to the decision in *In re a Debtor*—confined to persons falling within that class. On the other hand, the words 'harsh and unconscionable' and words of similar significance were frequently employed by Chancery Judges in describing that class of 'hard bargains' against which equity would grant relief in the case of expectant heirs. In the light of the Chancery cases a 'harsh' transaction would appear to mean one 'to which a reasonable man would not have acceded unless in great distress,' and 'an unconscionable transaction,' one in which 'an unconscientious advantage has been taken of the position of the borrower' (cf. *Beynon v. Cook*, L. R. 10 Ch. 389; *Neville v. Snelling*, 15 Ch. D. 703; *Middleton v. Brown*, 47 L. J. Ch. 411). It seems unlikely that this similarity of expression can be a mere coincidence, since the equity decisions were much discussed before the Select Committee of the House of Commons upon whose report the Act was framed. Moreover, the kind of contracts against which expectant heirs sought relief were usually contracts of loan, and frequently contracts with professional money-lenders (cf. *Earl of*

Aylesford v. Morris, L. R. 8 Ch. 484; *Crofts v. Graham*, 2 D. J. & S. 155; *Rae v. Joyce*, 29 L. R. Ir. 500; *Kevans v. Joyce* [1896] 1 L. R. 442), and, therefore, the evil, for which the equitable doctrine provided a remedy under certain circumstances, was similar to that which the Money-Lenders Act was intended to meet. It is submitted, therefore, that a consideration of the main grounds on which courts of equity have granted relief to expectant heirs may help to elucidate the problem.

Put shortly, the rule of equity was that a hard bargain with an expectant heir (which term includes not only legal reversioners, but all persons who have the hope of succession to property by reason of the expectation of a devise or bequest on account of the supposed or presumed affection of the ancestor or relative: *Beynon v. Cook*, L. R. 10 Ch. at p. 391) would be set aside and the onus was upon the person dealing with the expectant heir to show that the bargain was a fair one. Historically, the doctrine seems to have been originally based on grounds of public policy, since in many of the older cases stress was laid on such considerations as the desirability of preserving family estates and preventing 'a fraud on the ancestor.' But in more recent times it has been held that an expectant heir is not entitled to relief unless he can show some equity 'more directly personal to himself' (*Aylesford v. Morris*, L. R. 8 Ch. per Lord Selborne at p. 492; *O'Rourke v. Bolingbroke*, 2 App. Ca. 814, per Lord Hatherley at p. 833). Speaking generally, relief was granted mainly on the ground that, though the plaintiff might be *sui juris* and the contract unimpeachable on the ground of fraud, mistake, or undue influence, yet the parties did not negotiate on equal terms, and an unfair advantage was taken of the plaintiff's position. In nearly all the reported cases one or other of the following circumstances has been treated as a determining factor in the decision—the fact that the plaintiff was prevented by his very position from obtaining competent advice, that he was youthful, ignorant, reckless, or inexperienced, that he was under the pressure of poverty or illness, or that the bargain itself was intrinsically unfair, e. g. by reason of stringent conditions for repayment. Inadequacy of consideration has never been regarded as the only matter to be considered, though of course if it were once shown that the contracting parties were not on equal terms the Court would grant relief unless satisfied that the consideration was in fact adequate.

The above statement may seem inconsistent with such cases as *Wiseman v. Beake* (2 Vern. 121), *Edwards v. Brown* (2 Coll. 100), *Edwards v. Burt* (2 De G. M. & G. 62), and *Jones v. Ricketts* (31 L. J. Ch. 753), in which sales of reversions by middle-aged

reversioners, who were under no special pressure and perfectly able to protect themselves, were set aside merely on the ground that the price given was a little less than the true value of the property. But it may be doubted whether these cases do not go further than more recent and authoritative statements of the doctrine warrant, and at all events the hard and fast rule which they enforced was confined to reversionary interests. They led to the passing of the Sales of Reversions Act, 1867, which provides (s. 1) that 'no purchase (which is defined as including mortgage) made bona fide and without fraud or unfair dealing of any reversionary interest shall hereafter be reopened or set aside merely on the ground of undervalue.' This statute leaves untouched transactions not made bona fide, or in which there has been fraud or unfair dealing, and has no application to loans on personal security (*Beynon v. Cook*, L. R. 10 Ch. 389; *Aylesford v. Morris*, L. R. 8 Ch. 484; *O'Rorke v. Bolingbroke*, 2 App. Ca. 833).

So far, therefore, the doctrine of equity remained unaffected, but, though in theory unchanged as regards cases where the statute does not apply, it has not since 1867 reappeared in its extreme form. Since that date—with the possible exception of *Kevans v. Joyce* ([1896] 1 I. R. 442)—in no reported case has an expectant heir who was in all respects competent to protect himself and not under pressure obtained relief merely on the ground of inadequacy of consideration, and it has never been suggested that a borrower on personal security has a higher claim to relief than the mortgagor of a reversion. On the other hand, in all the cases especial stress is laid on the weakness of the borrower and the unconscionable advantage taken of such weakness by the lender, whereas, if the only conditions precedent to granting relief had been that the plaintiff should be shown to be an expectant heir and the consideration inadequate, such topics would have been entirely irrelevant. As regards mortgages of reversions, at any rate, it is submitted that the Sales of Reversions Act would prohibit the application of the doctrine to cases where the parties contract on equal terms (cf. *Rae v. Joyce*, 29 L. R. Ir. 500, per O'Brien L. J. at p. 520), and, it may be added in this connexion, that the Sales of Reversions Act can only be reconciled with the first section of the Money-Lenders Act on the assumption that the view expressed by Channell J. in *Carringtons Lim. v. Smith*, viz. that a high rate of interest does not *per se* render a transaction 'harsh and unconscionable,' is correct. Such, indeed, was Lord Chelmsford's view of the equitable doctrine in 1867: *Webster v. Cook*, L. R. 2 Ch. 542.

It seems, therefore, untrue to say that the rule of equity was

a purely arbitrary one, affording special protection to a favoured class without assigning any reason for so doing. Expectant heirs were singled out for special protection because they were regarded as 'a class of persons in some degree by their very position infected with some of the weaknesses of infancy' (*Aylesford v. Morris*, 42 L. J., Ch. 546), and were of necessity bound to secrecy, and precluded from seeking the advice and assistance of their friends and relations; and, as previously stated, equity also had regard to other sources of weakness, such as ignorance, poverty, or distress, though it was unnecessary that there should be evidence of anything approaching to undue influence. It might be 'the pressure of circumstances and not the pressure of individuals' (*Rae v. Joyce*, *supra*). And in considering whether the transaction should stand, equity would also inquire whether there had been any real bargaining, and whether the plaintiff, in fact, had independent and competent advice. Now these are precisely the considerations which would influence the Court in the application of the Money-Lenders Act, and indeed in *Carringtons Lim. v. Smith*, Channell J. said—

'Whenever the borrower is in such a state that his agreement cannot be taken as a test of what is reasonable—when he is ignorant, when advantage is taken of him, or when his necessities are such that he practically has no free will—there is no difficulty in applying the Act, and judges are not likely to hesitate to apply it.'

It should also be stated that equity granted relief where—apart from any consideration of the conduct or position of the parties—the terms of the bargain were of an intrinsically unfair character, and there seems to be some authority for saying that even at Common Law and in cases where neither of the parties is an expectant heir, a contract, the terms of which are so misleading as to amount to a trick, is not enforceable. Thus in *James v. Morgan* (1 Lev. 111), where a horse was sold for a barleycorn a nail and double for every nail, amounting to five hundred quarters of barley, Hide J. directed the jury to give the value of the horse, viz. eight pounds, in damages.

This case is referred to in *Thornborough v. Whitacre* (2 Lord Raymond, 11. 64), where, however, the Court expressed the opinion that if a man undertakes to perform the impossible he is bound by his contract; and it is also mentioned by Lord Hardwicke in *Chesterfield v. Janssen*—the leading case on the doctrine of expectant heirs. Since the Money-Lenders Act came into operation this principle has been applied by the Courts in granting relief against obscure

and misleading default clauses in money-lenders' agreements (*Levene v. Greenwood*, 20 T. L. R. 389; *Carringtons Lim. v. Smith* [1896] 1 K. B. at p. 91).

It remains to consider how far—if at all—the doctrine of equity has been extended by analogy to persons who are either not expectant heirs or not known to be such by the persons with whom they contract. In *Miller v. Cook* (L. R. 10 Eq. 641), Stuart V.-C. referred to two cases at Common Law, *Jestons v. Brookes* (Cowper, 793) and *Plumbe v. Carter* (reported in the note to *Floyer v. Edwards*, Cowper, 116), which are perhaps rather of historical than practical interest. Both were actions for money had and received, and Lord Mansfield said that 'such an action is analogous to a bill in equity'. In *Plumbe v. Carter* he held that though the transaction in question was not within the usury laws, the plaintiff was entitled to recover on the ground that the defendant had taken 'a hard and unconscionable advantage.' In *Jestons v. Brookes* the transaction was also found to be usurious. In neither case was the plaintiff an expectant heir, nor was there any suggestion that the parties were not on equal terms. As regards more recent authority, we find that in *Webster v. Cook* (L. R. 2 Ch. 542) Lord Chelmsford expressly refused to extend the doctrine. The correctness of this decision on the facts was doubted in *Tyler v. Yates* (L. R. 11 Eq. 265) by Stuart V.-C.; but Lord Chelmsford's view of the law is confirmed by a dictum of Jessel M.R. in *Beynon v. Cook* (L. R. 10 Ch. 389).

In *Nevill v. Snelling* (15 Ch. D. 679), which is the case usually cited as an authority for the extension of the doctrine, the plaintiff was the third son of the Marquis of Abergavenny, and the defendant—a money-lender—knew that the plaintiff was the son of a wealthy peer, and admitted that he contemplated the probability of being paid by the father to prevent exposure and bankruptcy. There would appear, therefore, to have been some evidence that the plaintiff was an expectant heir within the definition of Jessel M.R. in *Beynon v. Cook*. Denman J., however, though he 'had no doubt that the defendant also relied to some extent upon a general expectation that the plaintiff would probably at some time or other become entitled to an interest in the family estate,' seems to have held that the plaintiff could not be regarded as an expectant heir, but after reviewing the previous decisions, and remarking that in most of them stress had been laid rather on an unconscientious trading on the weakness and distress of the plaintiff than on the fact that of his being an expectant heir, came to the

¹ Compare Blackstone's language deriving the right of action on the common counts from 'natural reason and the just construction of law,' Comm. iii. 162.

conclusion that in no case had it been decided that the interference of the Court was limited to dealings with expectant heirs, and granted relief accordingly¹. This conclusion was adopted to some extent in *James v. Kerr* (40 Ch. D. 449) and *Rees v. De Bernardy* ([1896] 2 Ch. 437); but both these cases also rested on the ground of champerty. On the whole, therefore, it was certainly at the least doubtful at the time of the passing of the Act of 1900 whether relief would have been granted to persons who had only property in possession, or who had no property at all.

Such being the existing state of the law prior to 1900, the framers of the Money-Lenders Act had to consider how far that law afforded adequate protection against the admitted evils resulting from the conduct of professional money-lenders, and they found that equity provided an adequate remedy in the case of a particular class of borrowers, viz. expectant heirs, but that owing to the uncertainty as to the real extent and effect of the decision in *Nevill v. Snelling* that remedy was not in practice open to persons not falling within the favoured class.

It is submitted, therefore, that the intention of the Legislature was in the first place to put all borrowers dealing with professional money-lenders in substantially the same position as expectant heirs, and secondly, to preserve any existing remedies unmodified (cf. sect. 1, subsec. 6). The latter consideration, perhaps, explains the insertion of the apparently superfluous words 'or otherwise such that a Court of Equity would give relief,' which seem intended to emphasize the fact that the Act is not to be regarded as in any way curtailing the equitable doctrine. There will, at any rate, remain this distinction between expectant heirs and other persons, that as regards the former the onus of proof will rest upon the lender, whereas in other cases it will be upon the borrower. But, on the other hand, the Act would seem to have in one respect modified the practice of equity in favour of the lender by allowing the Court to award him a higher rate of interest than five per cent. (cf. *Rae v. Joyce*, 29 L. R. Ir. 500).

L. J. STURGE.

¹ [I should prefer to state the effect of the decision as being that the jurisdiction to protect 'expectant heirs' is not confined to loans made with reference to specified expectations. Some of the dicta, certainly, seem rather wide.—ED.]

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

International Law. Vol. II: War and Neutrality. By L. OPPENHEIM, LL.D. London: Longmans, Green & Co. 1906. 8vo. xxxiv and 595 pp. (18s. net.)

IN this sequel to the volume on Peace which we lately reviewed Dr. Oppenheim has again given us a learned treatise, in which he takes account of the most recent facts and opinions, with a bibliography preceding each chapter and section that will enable the student to pursue a wide range of research. His opinions, as before, are cautious; and we may say on the whole that he rather aims at preparing his reader to follow the discussions that may be expected in the promised congress than at joining in the fray. For that purpose the book will be very useful.

The remarks which occur to us as necessary to make turn chiefly on questions of language. For instance, 'conquest,' which has the established meaning of the annexation of territory by force of arms without cession, he employs in the sense of occupation, and describes the annexation as subjugation, a term to which English writers have given no technical sense: p. 277. The reader will not be led into any mistake, for, here as always, our author explains fully and clearly the senses in which he intends to use, and in fact uses, his terms; but it seems to us a pity to innovate in language unnecessarily.

Another point which may perhaps be classed as belonging to language rather than to substance is Dr. Oppenheim's definition of neutrality as an attitude of impartiality. He freely admits that real impartiality is impossible without abstaining from giving assistance to either belligerent, and this being so, and the duty of abstention being no less capable of being presented as a principle than the duty of impartiality, surely it is better to make it the foundation of neutral duties. This indeed is what Vattel did, thereby making an advance on the teaching of Grotius and Bynkershoek, and it has commonly been done ever since, with continually growing consequences which Vattel failed fully to draw out, though they were implied in his point of view. Dr. Oppenheim accepts all the consequences, and it is therefore the more difficult to understand why he has reverted in form to the older doctrine. J. W.

Year Books of Edward II. Vol. III. 3 Edward II, A.D. 1309-1310. Edited for the Selden Society by F. W. MAITLAND. London: Bernard Quaritch. 1905. 4to. xcv, 1-202 (double), 203-244 pp.

Year Books of the Reign of King Edward the Third. Years XVIII and XIX [Rolls Series]. Edited and translated by LUKE OWEN PIKE. 1905. La. 8vo. lvi and 616 pp.

IN the introduction to the new Selden Society volume of Year Books, an introduction more interesting if possible than the first (see L. Q. R. xx. 94), Mr. Maitland pursues his critical examination of the fourteenth-century Year Books. He shows conclusively that the MSS. are in no sense authoritative reports, but are in the nature of commonplace books kept by

young practitioners or students, and probably made up from rough notes taken at the time in Court, not always the writer's own notes. The practice of borrowing other men's lecture notes is by no means unknown in the Universities at this day. All that interested the studious medieval apprentice was the discussion of pleading points. This was not equivalent to formal argument and decision on written pleadings, but was preliminary skirmishing in Court which, as a rule, left no trace on the record. Counsel for a defendant would, as Mr. Maitland puts it, talk of demurring; but he did not at this stage actually demur; whether it was worth his while to risk a demurrer was just what he wanted to find out. The off-hand opinions of the judges in these debates, whether of positive authority or not, which seems doubtful, were obviously valuable for the guidance of young pleaders.

Matters not necessary to the points of pleading—such collateral details as names of parties and places, and what finally became of the case—did not seem interesting at the time, and no trouble was taken about them. Often, indeed, names appear to have been purposely altered, either to make them more distinguishable when there happened to be two Johns or Maries among the real parties, or out of mere caprice.

All this, as Mr. Maitland carefully notes, does not amount to proof positive that the Year Books of the fifteenth or sixteenth century did not in some way acquire a more authoritative character. But, if any one now maintains that this happened, we conceive that the burden of proof is on him to produce better evidence than the statement made on hearsay by Plowden and repeated in a *crescendo* of assurance by Coke, Bacon, and Blackstone¹. We know that a Year Book report of the time of Henry VI was found by Henry VIII's judges to be contrary to the record (Bro. Abr. *Executor*, pl. 22). One thing about our fourteenth-century MSS. which would alone be enough to stamp them as mere private enterprise is that we constantly get variant reports of the same case, at times as many as four. Mr. Maitland sets out a specimen at large in the course of his introduction. It may be that examination of later MSS. will show these variations persisting, or, on the other hand, that it may disclose the prevalence, after an assignable date, of one, and only one, version of each case. In the latter event we should have some evidence that there was some kind of selection and editing. On the face of them the later Year Book reports do not appear to differ in any material quality from the earlier, save that they are on the whole fuller, and that the language degenerates pretty fast after it becomes an artificial rendering in lifeless Anglo-French of what was said in Court in living English.

It is interesting to observe that the only Court which furnished, as a rule, reportable matter was the Court of Common Pleas. The number of counsel practising there appears to have been less than twenty-five. One question remains which (we speak it to our shame) it would be needless to ask in any country but this. How long are the Selden Society and Mr. Maitland to cope single-handed with what ought to be a national undertaking?

Meanwhile it is something that Mr. Pike's excellent work on the Year Books of Edward III is continued. In his introduction to 18-19 Ed. III Mr. Pike calls attention to the career of Grene, afterwards a very learned judge, at the Bar, where his persistency seems to have annoyed the Court.

¹ On looking again at this statement, it occurs to me that it has no necessary or even probable reference to the Year Books, and may be a mere pious fiction of a remote golden age.

The type of advocate who is 'plus sage qe Dieux' is probably not lacking in any generation of lawyers.—As late as 1344 it was arguable, and solemnly argued, whether a gift to a man and the heirs male of his body was within the Statute *De donis*.—The equation of law with reason, in the sense of natural justice, is asserted in a dictum of Stonore C. J., rebuking his brother Hillary, who said that law was what the Justices chose. 'Nanyi; ley est resoun.'—Several curious questions arising out of villenage are discussed by Mr. Pike. He confirms a suspicion we have entertained for some time (whether on a previous hint somewhere in Mr. Pike's own introductions, or on what other occasion, we do not recall) that collusive admissions of villenage were not uncommon. As to the villeins or reputed villeins who appear to have been *nullius filii*, we do not see—unless there is something very special in the unpublished record—why the classical real property law of Littleton should have any difficulty in accounting for them as *liberi homines tenentes in villenagio*. F. P.

Recht und Technik des Englischen Parlamentarismus, Die Geschäftsordnung des House of Commons in ihrer geschichtlichen Entwicklung und gegenwärtigen Gestalt. By Dr. JOSEF REDLICH. Leipzig: Verlag von Duncker & Humblot. 1905. La. 8vo. xx and 881 pp.

DR. REDLICH's new work is an important contribution to the materials for the study of the British Constitution, and deserves the careful attention of all persons interested in the subject. The book contains the first systematic and complete account of the history and of the present state of English Parliamentary Procedure, and shows in a most remarkable manner how the development of the rules of procedure is connected with the evolution of the several branches of the Legislature and of the other constitutional organs, and the successive modifications of their respective powers and functions. The historical portion of the book distinguishes between the period antecedent and the period subsequent to the Reform Bill of 1832, and divides the first period into three separate parts, of which the first comprises the time in which the two Houses of Parliament gradually assume a definite shape, whilst the second—beginning with the accession of Elizabeth and ending with the accession of William III—witnesses the extension of Parliamentary powers and the origin and growth of a regular scheme of Parliamentary procedure, and the third—covering the remainder of the period—brings about the changes in that scheme, necessitated by the formation of a definite party system and the first beginnings of Cabinet government in its modern form. The part dealing with the events which have happened since 1832 calls attention to the transformation of the procedure of the House of Commons, due to the change in the character of Assembly, to the invention of Parliamentary obstruction, and to other causes.

In the portion dealing with the rules in force at the present moment, the constitutional position of the House of Commons and its social and political structure are discussed, as well as its legislative, administrative, and financial functions and methods of work. The duties of the Speaker and of the other officers of the House are also described in separate chapters.

The author does not purport to deal *in extenso* with the procedure of the House of Lords, but the relations of the two Houses are so fully explained that it is not incorrect to describe the work as a general guide to Parliamentary Procedure. Dr. Redlich is never content with second-hand materials, but he has a wide acquaintance with the works of constitutional

writers as well as with the original sources of information, and he has above all that practical insight into the working of the Constitution which mere learning can never impart to the full extent.

It is only natural that a book dealing in an elaborate manner with an intricate and difficult subject should contain some assertions which are not entirely unobjectionable, but in the work before us there are only very few statements to which exception can be taken, and they do not concern any important matters. One of the few passages which may possibly mislead continental readers occurs on p. 355, where the offices under the Crown of which the holders are not eligible as members of the House of Commons are referred to. The passage, as it stands, is quite correct, but a reader not acquainted with the statutes on the subject will be unable to discover from its tenor that every member of the Judicial Bench and every member of the permanent administrative civil service is disqualified and consequently excluded from participation in active politics. This fact is so much taken for granted in England that it is not much noticed in the ordinary textbooks, but it stands in such marked contrast to the rule on the subject prevailing in some continental countries that attention ought to be called to it in a work intended to be used for comparative purposes.

It is to be hoped that an English translation of this interesting and highly valuable work will soon be published. E. S.

The Law of Parliamentary Elections and Election Petitions. By HUGH FRASER. London: Butterworth & Co. 1906. La. 8vo. xxiv and 430 pp. (15s.)

THIS is an altogether admirable work. Within forty Articles is to be found a succinct statement of the law; and in the notes to the articles a full explanation of those articles. It is therefore rendered easy to see at a glance, under each appropriate heading, what the law is, and to criticize the statement in the Article by reference to the cases and decisions set out in the notes.

The arrangement adopted by the author of this book is on the score of conciseness, convenience of reference, and definiteness to be commended.

The book in addition to a presentment of the law in this form contains also a fully set out table of statutes, and all necessary forms and precedents. The Index of Contents also seems to be sufficient.

It should be pointed out that in Article I there is a misstatement of the law. It is there stated that 'any one may be a candidate for Parliament except . . . any person who has within the preceding five years been adjudged bankrupt in England, unless the adjudication has been annulled, or he has obtained his discharge &c.' It would therefore appear that a bankrupt whose adjudication was more than five years back would be entitled to stand for Parliament. This is not so, for except upon annulment or a special certificate, the disabilities of bankruptcy are not removed until five years has elapsed from *the date of discharge*. This fact is however made clear in the notes, so that the misstatement can hardly mislead any one.

E. B. B.-R.

English Constitutional History, from the Teutonic Conquest to the present time. By T. P. TASWELL-LANGMEAD. Sixth edition, revised with Notes by P. A. ASHWORTH. London: Stevens & Haynes. 1905. 8vo. xxiv and 640 pp. (15s.)

TASWELL-LANGMEAD has long taken its place as the best student's book on Constitutional History, at any rate of those books that give a sketch of

the subject with some regard to chronology. In this edition Dr. Ashworth is to be congratulated upon the courage with which he has applied the pruning knife. The author's text has been left untouched, but both the author's original notes and those added by the former editor have been cut down to more reasonable dimensions. The decision to do this is in every way a wise one, because the book was becoming overloaded with notes, thereby spoiling its value as an introductory volume, and the notes did not supply the place of the more extensive details that are given in the treatises of Stubbs, Hallam, and Erskine May.

The editor's notes are in most cases confined to references to recent authorities, and the only criticism that one can make is that too many of these are omitted. To take a few instances from the early chapters:—

P. 3. Mr. Scrutton's Yorke Prize Essay on the Influence of the Roman Law on the Law of England is not referred to.

P. 46 and elsewhere. Prof. Vinogradoff on the Growth of the Manor should surely be noticed as an authority on this subject.

Chap. IV. There is no reference to recent works on Magna Charta, such as Mr. McKechnie's Commentary and Mr. Edward Jenks's paper in the Independent Review for 1904.

P. 129. On the subject of Trial by Jury it is quite right to mention Brunner's decisive proof of its ultimate origin, but the exposition of its later history in England by Thayer in his 'Evidence at the Common Law' should not have gone unmentioned.

P. 152. In connexion with the Justices of the Peace the student is not referred to Dr. Beard's monograph in the series of Columbia University Studies in History, Economics, and Public Law.

H. J. R.

Russell on Arbitration and Award. Ninth Edition. By EDWARD POLLOCK and HAROLD WARREN POLLOCK. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1906. La. 8vo. lxxv + 627 pp. (30s.)

THE ninth edition of this well-known textbook, although more than 70 pages longer than the eighth edition, is far less bulky than the earlier editions, and combines the merits of clear print and convenient size. The most important question which has arisen since the last edition is as to the right of appeal from a Master when an action has been referred to him under Order XIV, rule 7 (as amended in 1902). The importance of the question is considerable, since if there is no appeal from the Master's decision it is very difficult for solicitors to advise their clients to consent to a reference to the Master. The right of appeal is now established by *Fraser v. Fraser*, but it required three decisions to arrive at this result. First the Court of Appeal decided that there was no appeal to the Court of Appeal from the decision of a Master on a reference under Order XIV, rule 7 ([1904] 1 K. B. 56); then the Divisional Court decided that there was no appeal at all from a Master's decision on such a reference ([1904] 2 K. B. 245); finally the Court of Appeal decided that such a right of appeal does exist, but that the appeal lies to the Divisional Court and not to the Court of Appeal ([1905] 1 K. B. 368). That is to say, the Master is not a common law arbitrator, but the reference is to him as an officer of the court under s. 11 of the Arbitration Act, 1889, and consequently rules 6 and 6 a of Order XL apply.

The only other decision of importance which has occurred since the last edition is that of *Wynne Finch v. Chaytor* [1903] 2 Ch. 475, which decides

that when in an action in the Chancery Division the whole action has been referred to an official referee, and judgment has been entered in pursuance of his direction, an appeal from the judgment does not lie direct to the Court of Appeal, but an application to set aside the judgment should be made to the judge of the Chancery Division to whom the action is assigned.

The index and table of cases appear to have been carefully prepared, and the ninth edition of Russell on Arbitration will no doubt prove as useful to practitioners as the former editions.

An Encyclopaedia of Forms other than Court Forms. By eminent Conveyancing and Commercial Counsel. Under the general editorship of ARTHUR UNDERHILL, assisted by HAROLD B. BOMPAS, E. J. NALDRETT, R. POWELL-WILLIAMS, HARRY BEVIR VAISEY, and HUMPHREY H. KING. Vol. X. Patents to Public Health. London: Butterworth & Co. 1906. La. 8vo. lix and 667 pp. (25s.)

THIS volume contains Patents, Pawnbrokers, Profit Sharing without Partnership, Provident and other Societies, and Public Health.

The preliminary note on Patents contains discussions as to who is the true and first inventor, what is a manufacture, and what is novelty, utility, and invention. It also contains a careful description of the method of applying for a patent, including a full account of the construction of the specifications and what ought to be contained in them, how to amend a specification, the examination of the application and specifications, the acceptance of the specifications, and the grant of the patent.

The matters discussed in the parts of the preliminary note that we have mentioned are probably of interest to a limited class of practitioners only, but the matters treated of in the remaining part of it constantly occur in practice. They consist of devolutions, assignments, patents, and licences both voluntary and compulsory, in connexion with which the remarks on registration must be considered. There are a few other matters discussed which it is not necessary to refer to. There is a large collection of precedents which will be a safe guide to the practitioner in all cases of common occurrence.

The heading Pawnbrokers contains a preliminary discussion and collection of precedents.

The precedents under the head of Profit Sharing are interesting. The first of these precedents consists of regulations under which the persons employed by a company or firm are to share in the profits. The outline of the scheme is that the employees who receive less than a certain weekly sum are divided into four classes according to their weekly wages, and that the members of each class shall receive a percentage of a fund to be called the bonus fund. The weak part of this scheme is that the amount of the bonus fund is to be determined by the accountants who make out the yearly balance sheet, and that there is no indication of the rules which are to guide them in determining what sum is to be placed to the credit of the bonus fund, and it appears very doubtful whether in case of dispute the employees can insist on any or at least more than a nominal sum being placed to the credit of the bonus fund.

There is a short though useful preliminary note on Provident and other Societies, in which the differences between a Provident Society registered under the Industrial and Provident Societies Act, 1893, and an ordinary

Joint Stock Company are discussed. The precedents under this head appear to contain all the forms which will be useful in practice.

The heading Public Health has space assigned to it in proportion to its importance. The general introduction, preliminary note, and the precedents occupy about 430 pp. The preliminary dissertations and notes are of great value, and will be found very useful by the officials of local authorities. As however their contents are not of much interest to the ordinary practitioner, and as generally speaking they are not adapted to his use, and as a review doing them justice would occupy many pages, we content ourselves with calling the attention of those interested to the nature of the information that they will find under this heading. The forms appear to have been framed carefully, and we do not doubt that they will be found well suited to the purposes for which they are intended to be used. In conclusion we can only say that this volume keeps up to the high standard that the editor has adopted in the former volumes.

The Law of Compensation. By ALFRED A. HUDSON, assisted by H. E. MILLER, W. A. PECK, and S. HUMPHRIES. London: The Estates Gazette, Lim.; Sweet & Maxwell, Lim. 1905. Royal 8vo. Two vols. cxcviii, 232 and 1598 pp. (37s. 6d.)

THIS is a new work of prodigious bulk and certainly cheap at the price, but we do not feel sure that it is required by the legal practitioner, who is already amply provided with books on the subject of compensation and arbitration, whether written by way of annotation on the statutes (the better method and the method adopted in the present work) or in the shape of a continuous dissertation. But the form of the work suggests that it is intended rather for persons other than practising lawyers, who desire legal information and have not reports and other books of reference at their command. The sections are annotated by means of tables of contents, and propositions illustrated by the decided cases, which are set out at a length quite unnecessary for a person who has the cases themselves at hand, but doubtless useful for those who have not. This was the method adopted by the author in his useful previous work, on Building and Engineering Contracts. Whether the method always conduces to clearness may be doubted. We turned for instance quite casually to see what the work said on the subject of giving notices to treat to yearly tenants, as it happened to be uppermost in our mind at the moment. In the lengthy introduction (a useful and well-composed piece of work), at p. clxxv we found nothing definite on the matter. We then turned to the notes on s. 18 of the Lands Clauses Consolidation Act, 1845, partly because we knew that section dealt with notices to treat, and partly because the only reference to the matter which we could see was in the Index to the notes to that section. There we found, in the table of contents, p. 113 'III. The Notice to Treat. Persons to whom notice must be given . . . (b) yearly tenant (*see* s. 121) p. 139 . . . IV. Cases where Notice to Treat is unnecessary (a) Tenants from year to year (*see* s. 121) p. 142.' This did not seem particularly illuminating; however, we persevered. On p. 139 we found '(b) yearly tenants (*see* s. 17).' Pursuing our weary course back to s. 17 of the Act, to which we supposed ourselves to be referred, we found something about a certificate of two justices that the capital had been subscribed. Still more footsore we tried p. 142 and there found '(a) as to yearly tenants, *see* s. 121.' We saw s. 121, and there we found a definite statement that a notice to treat was not necessary (p. 670), but no authority was cited as illustrating this

rule. The authority which definitely decides the point, *Syers v. Metropolitan Board of Works*, is given on p. 672 in illustration of a sub-rule, but no special attention is drawn to the words which settle the main rule.

The Lands Clauses Consolidation Act, 1845, fills the first volume. The second volume is occupied by other Acts dealing with compensation, and some useful appendices of forms, &c. The annotation of these Acts is not always so full as it might be, for instance, take the notes on the Parliamentary Deposits and Bonds Act, 1892. We have noticed one or two other peculiarities. *Raleigh v. Goschen* [1898] 1 Ch. 73 is dealt with on p. 1073. Not only is the reference wrong, but it cannot be said that the synopsis of the case there given conveys much idea of the decision. This is an instance where some of the abundant space bestowed elsewhere might usefully have been employed. The case of *Blundell v. R.* [1905] 1 K. B. 516 and the kindred cases should have been cited in the notes to the Defence Act, 1842, rather than in the notes to the Ranges Act, 1891. The only other reference which we looked up in the Index contained an error, 'Light Railways Costs Rules, 1898 . . . 856' instead of 956.

But the book is one of great labour and appears to be generally accurate. It will, no doubt, be of service to those persons to whom we have already referred.

Outlines of the Law of Torts. By RICHARD RINGWOOD. Fourth Edition. London: Stevens & Haynes. 1906. 8vo. lii and 320 pp. (10s. 6d.)

MR. RINGWOOD has at least one qualification for writing for students, namely, the ability to eliminate relatively unimportant details from the exposition of general principles. Moreover 'Outlines of the Law of Torts' has not been spoiled in re-editing, as many textbooks are, by the anxiety of the editor to include references to all recent cases without considering whether or not they help to elucidate general principles so as to come within the proper scope of an elementary work. Agreeably with his methods Mr. Ringwood has set forth the effect of the *Allen v. Flood* and *Quinn v. Leatham* group of cases with commendable clearness and caution. He might, however, have cited *Tarleton v. McGarvey* (1 Peake, N. P. C. 270; 3 R. R. 689) and *Garrett v. Taylor* (Cro. Jac. 567) in support of a proposition which he deduces with some misgivings from dicta in *Allen v. Flood*.

It is to be regretted that he classes the group of wrongs illustrated by these cases with maintenance and malicious prosecution under the title of 'malicious injuries.' Having done so he has to get rid of the basis of his classification by explaining that it is not necessary to prove 'malice in fact or actual malice.' It is time we heard the last of 'malice in fact' and 'malice in law.' But, if we are to have a group of 'malicious injuries,' it is hard to understand why libel and slander are not included in it. As to maintenance, the author leaves it to be inferred, though he does not in words assert, that actual malice is a necessary part of the cause of action.

The chapter on Negligence is not satisfactory. The author begins by laying it down that 'just as each man must use his own property in such a way as not to do any damage to his neighbours, so it is the duty of every one to use such care in his daily life and in the conduct of his business as an ordinarily careful man would use in order to avoid doing harm to or bringing loss upon another person.' Surely this statement, made without indicating any kind of exception, is much too wide. It

makes the duty to take care universal and unqualified. It is even worse than Lord Esher's famous dictum in *Heaven v. Pender*. There is a suggestion under the heading 'whom to sue' that there are some circumstances in which negligence resulting in damage to another is not actionable: but no beginner reading the chapter would realize that the foundation of every action for negligence is a breach of a duty to take care and that such a duty is not universal. The law of negligence can never be made clear until the learner has grasped this elementary proposition. Nearly all recent cases on negligence and many of the older ones have turned upon the question whether in the particular circumstances there is a duty to take care.

The Annual Digest of Reported Decisions during the Year 1905. By JOHN MEWS. 1906. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 8vo. xvi and 396 pp. (15s.)

The Yearly Digest of Reported Cases for the Year 1905. Edited by G. R. HILL. 1906. London: Butterworth & Co. 8vo. lxx and 418 pp. (15s.)

THE Annual Digest is a digest of all the reported decisions of the Superior Courts, including a selection from the Scottish and Irish. It gives references to the Law Reports, the Law Journal Reports, the Law Times Reports, the Weekly Reporter, the Times Law Reports, Aspinall's Maritime Cases, Commercial Cases, Cox's Criminal Cases, Local Government Cases, Manson's Reports, Smith's Registration Cases—and also to Court of Justiciary Cases, Court of Session Cases, and Irish Reports. It is still thought necessary to continue the practice of placing the reference to the Law Journal before the reference to the Law Reports; but this practice is surely not justified by the fact that the publishing firms responsible for the digest, or one of them, have or has an interest in the Law Journal Reports. The Yearly Digest gives references to some other Scottish Reports, to all the English Reports referred to in the other digest, to the Irish Reports, to the Reports of Patent Cases and to M'Namara's Railway and Canal Cases.

The Yearly Digest properly gives the first reference to the Law Reports. In the Table of Cases the Annual gives only the plaintiff's name alphabetically; the Yearly gives alphabetically the names of both plaintiffs and defendants. There are many points of similarity in the two digests. Each has a table of cases overruled, considered, &c. The Annual alone refers to the Statutes passed in the year 1905, but the Yearly, on the other hand, has lists of the statutes, rules and orders referred to in the digested cases.

There is in fact little to choose between the two digests. Each of them ignores the cases which only appear in the Weekly Notes, the Law Journal's Notes of Cases, the Law Times' Notes of Cases not yet reported, and the Solicitor's Journal.

If in England there are cases, not reported or noted in the Law Reports or Weekly Notes, which are worthy of notice, one might as well have the whole lot, and to the editors and publishers of both digests we offer the suggestion that references should be given at any rate to those cases which appear in the Weekly Notes and Solicitors' Journal, but are not reported in, say, the Law Reports or Law Journal.

Company Precedents, for use in relation to Companies subject to the Companies Acts 1862 to 1900. Part I, with Copious Notes and an Appendix containing Acts and Rules. Ninth Edition. By FRANCIS. BEAUFORT PALMER, assisted by the Hon. CHARLES MACNAGHTEN, K.C., and FRANK EVANS. 1906. London: Stevens & Sons, Lim. cii and 1708 pp.

Μέγα βιβλίον μέγα κακόν has its exceptions, and this is one of them. The joint-stock company nowadays

‘Doth bestride the world
Like a colossus.’

We are all shareholders or debentureholders, if we are not directors, of companies. Our Law Reports are full of company cases, our newspapers, financial and other, are ceaselessly recording the doings of companies and announcements of new issues; in fact, nothing short of a volume of the magnitude of this latest edition of *Company Precedents* suffices to cope with all the varied developments and activities of joint-stock enterprise at home and abroad. It is instructive to compare it with the modest volume which Mr. Palmer first offered to the public on the subject, nearly thirty years ago now. This new edition fully sustains its author's reputation. We never look for guidance without finding it. Forms and cases and notes—the fruits of unique knowledge and ripe experience—all combine to smooth the practitioner's path.

The Care of Ancient Monuments; an Account of the Legislation and other Measures adopted in European Countries for protecting Ancient Monuments and Objects and Scenes of Natural Beauty, and for Preserving the Aspect of Historical Cities. By BALDWIN BROWN. Cambridge: University Press. 1905. 8vo. xii and 260 pp.

It will be seen from Professor Baldwin Brown's title that he covers wide ground. ‘The term monument,’ as he uses it, ‘embraces all old buildings and other memorials of bygone days.’ He admits that attempts to find an exact definition of the expression for the purposes of such conservative movements as those he describes have failed, and for a very obvious reason. The impulse to protect such monuments as Stonehenge derives its force not so much from analytical antiquarianism as from the desire to preserve the interesting features of a country, however produced. ‘The effect on the mind of a scene of natural sublimity is similar to the effect of one of the grand monuments of antiquity.’ Thus the movement tends to embrace purely natural objects,—as exemplified by ‘The National Trust for Places of Historic Interest or Natural Beauty,’—while on the other hand it must logically extend to movable objects, such as are preserved in museums, and cannot wholly ignore the large class of ‘humble domestic relics,’ ‘town houses, country cottages, street fountains, rustic bridges, and the like,’ which though beneath the notice of any official inventory go to maintain the character of a scene,—that general aspect, which in relation to a town the Germans have christened ‘das Stadtbild.’ As one descends in the scale of importance, the difficulty of preservation naturally increases. A country must be adapted to the needs of its inhabitants from time to time; and many things which have a charm, perhaps as interesting specimens of construction, perhaps purely from age, must go, unless the proprietor of his own free will chooses to keep them. Paradise Row,

Chelsea, a row of picturesque old-world cottages which recently attracted public attention, furnishes a case in point. Every one must regret their disappearance; but no one would advocate that they should be the subject of legislation, and few would be ready to acquire them at the price which the value of the site would dictate. For the purpose of legislation 'monument' must obviously have a restricted sense; but for the purpose of describing the outcome, in all forms, of the interest recently aroused in the evidences of the historic continuity of a country, Professor Baldwin Brown is right in giving the more extended meaning to the term.

There can be no question that in this work we have the most complete statement that has yet appeared, both of legislative, of executive, and of purely voluntary action, in relation to the care of monuments. The movement is indeed so alive that every year furnishes new matter for the chronicler. Some eight years ago, at the instance of the National Trust, the Foreign Office obtained information as to the position of the question in the principal European countries. Since then Ancient Monument Acts, giving definite powers of compulsory acquisition, have been passed in Italy and Hesse-Darmstadt, the whole German movement has, in a definite shape, taken its rise, and, in our own country, legislation has been greatly extended and local action authorized. Prof. Baldwin Brown, after discussing the various questions which arise in connexion with his subject, gives a careful and detailed account not only of the state of the law, but of the expressions of organized public opinion, in each European State. And in this connexion he makes the pregnant remark, that while the historic sense finds more vivid expression as countries become more highly civilized, legislation at the same time becomes more difficult. Side by side with the desire to preserve the country's monuments grows the jealousy of interference with private property, and that restraint on iconoclasm which is accomplished by a stroke of the pen in a despotic State is only provided in a free country after infinite exertion, to a limited extent, and in a modified form. If we read Prof. Baldwin Brown aright, the only countries in which a clear right of expropriation—the key of the position—exists are France, Italy, Hungary and Hesse-Darmstadt; but on the other hand there are far-reaching 'Decrees' in other places, and in Germany there are local regulations of some stringency in particular towns, such as Hildesheim, Nuremberg, Rothenburg, and Bamberg. In point of State expenditure, France still shows the way, its average budget allowing for some £50,000; while in one year no less than £120,000 were voted. Our own Estimates for this year contain an item of £12,500 for the 'Maintenance and Protection of Ancient Monuments,' but it may be suspected that the major part of this sum is expended on the care and management of actual State buildings such as the Tower. The salary of the Inspector of Ancient Monuments seems to have disappeared and we fear that the office is not filled.

On the whole, Prof. Baldwin Brown's wide survey of the subject shows a steady growth of public opinion, and is encouraging both from the artistic and from the historic point of view.

The Law of Money-lending, Past and Present. By JOSEPH BRIDGES MATTHEWS. London: Sweet & Maxwell, Lim. 1906. 8vo. xvi and 141 pp. (5s.)

THIS is a good little book, scholarly in the historical part and workman-like in the practical. Mr. J. B. Matthews is, naturally enough, exercised by

the difficulty of knowing what is the criterion of terms being 'harsh and unconscionable.' He would find it instructive to consult the line of Indian cases which we have more than once mentioned here: *Mackintosh v. Hunt* (1877) I. L. R. 2 Cal. 202, and *Mackintosh v. Wingrove* (1878) I. L. R. 4 Cal. 137, show precisely the difference between a fraudulent bargain in which there is disguise and oppression, and a hard but open bargain which is fully understood and accepted: and see the references collected in the notes to the Indian Contract Act, ed. Pollock and Mulla, pp. 74-76.

At p. 61 Mr. Matthews cites an unreported case from his own practice; the statement, as he vouches for it, is of course quotable in Court. The burden of counsel and solicitors would be rather seriously increased if statements of this kind became common in textbooks. We are far from saying that, having regard to the present scantiness and uncertainty of authority on the Money-lenders Act, Mr. Matthews was not justified in the present instance.

The Law of Repairs and Improvements, including Ecclesiastical Dilapidations. By J. H. JACKSON. London: Butterworth & Co. 1905. 8vo. xlix and 318 pp. Index 56 pp. (15s.)

THIS book, as may be judged by its title, covers a wide ground. It is very well done as a whole, and the cases are collected under convenient heads. The few signs of lack of care in revision are no doubt due to Mr. Jackson's business engagements. Perhaps the most curious sentence is the following: 'A delay in reinstating disrepair due to fire, may be waste: on the other hand, no responsibility attaches for acts of God, such as lightning.' As a general rule, however, the result of the cases is stated with clearness and accuracy. We should like to add that we do not read *Woodhouse v. Walker* (1880) 5 Q. B. D. 404 as laying down that an omission to repair by a tenant for life is a tort, but that a devisee for life, upon whom an express obligation to repair is imposed by the will, commits a breach of the statutory duty created by the statutes of Marlbridge and of Gloucester under the circumstances. The view that an action at the common law must rest in contract or in tort cannot now be treated as correct. It is clear that Kay J. in *In re Cartwright, Avis v. Newman* (1889) 41 Ch. D. 532, read the language used in *Woodhouse v. Walker* as referring to a breach of a statutory duty.

We have also received:—

The Arbitrator in Council. London: Macmillan & Co., Lim. 8vo. vi and 567 pp.—This is not a law-book, and not much of it is directly within our scope. But it contains the work of some one who is obviously learned and more than commonly learned in the law. We doubt whether the dialogue form in which the book is cast represents any real plurality; but, assuming the existence of cultivated laymen *A. B.* and *C. D.*, more or less like some of the fictitious persons, there is an *E. F.* who knows not only Selden but West's 'Symboleography,' and who has made a special study of the Reformation controversies, the early Puritans and Quakers, and international law and arbitration. Lawyers, therefore, will find here some very pretty and scholarly recreation. The only defect we have noted is that in the chapter on 'Private War and the Duel' Mr. George Neilson's 'Trial by Combat,' the very best monograph, is omitted from the list of authorities, with the result of making the exposition less clear than might be wished as to the fundamental distinction between the earlier trial by

battle, which had nothing to do with chivalry or knightly weapons, and the later chivalrous duel. We trust, indeed, that an admiral who talks of using six-inch guns against torpedo boats has no living counterpart in the service; but that is outside the faculty of law. The general tendency of the book is what the French call 'pacifiste.' We admire the intention, but cannot accept all the reasons. From a literary point of view we should have preferred the dialogues not to be introduced by the fiction of a posthumous publication, which is now too common to deceive the most innocent reader.

The General Principles of the Law of Corporations (being the Yorke Prize Essay for the year 1902). By C. T. CARR. Cambridge: at the University Press. 1905. xiv and 211 pp.—This little volume, the Yorke Prize Essay for 1902—only slightly altered, as the author states in his preface, for publication—is a creditable production, though without any claim to originality. The subject of the true nature of the corporation, and the rights and liabilities of unincorporate bodies of persons endowed with a greater or less degree of organization, is one which is attracting a good deal of attention at the present moment, and will probably attract a good deal more in the near future. Mr. Carr's book contains a useful summary of the principles of English law relating to Corporations, and references to authorities which should also prove useful. Something has been done in the way of illustration from American writers. If, however, the author desires to go beyond merely English home authorities, he can still find ample fields for research within the British Empire, and might usefully pursue the subject of corporations, statutory and otherwise, in their development in Canada, Australia and South Africa.

Der Nachweis von Schriftfälschungen, Blut, Sperma u. s. w. . . mit einem Anhang über Brandstiftungen. Von Prof. Dr. M. DEHNSTEDT and Dr. F. VOIGTLÄNDER. Braunschweig: F. Vieweg u. Sohn. 1906. 8vo. 248 pp. (M. 9.)—A monograph for experts and criminal investigators on the modern processes of what may be called forensic laboratory work: detection of forgeries by magnified photographs revealing, with or without chemical aid, erasures or differences between original and superposed ink; identification of human or other blood by spectroscopy, and so forth. Many illustrations of micro-photography are given. There is an appendix on the methods of incendiarism. A really skilful case of arson is, it appears, not easily traced. Fire-raisers are happily for the most part not less clumsy than other criminals. The book may be recommended to specialists who are well enough versed in technical German to make use of it.

Principles of the Law of Partnership. By ARTHUR UNDERHILL. Second Edition. London: Butterworth & Co. 1906. 8vo. xx, 154 and 22 (index) pp. (5s. net.)—There does not appear to be any material change in this edition, except that the form of lectures has been dropped. Perhaps the recent and not unimportant decision in *Garner v. Murray* [1904] 1 Ch. 57 might have been more fully explained with advantage.

The Elements of Criminal Law and Procedure, for the use of Students. By A. M. WILSHERE. London: Sweet & Maxwell, Lim. 1906. 8vo. xx and 259 pp. (7s. 6d.)—This book affects to set out in about 250 pp. the whole body of both the substantive and adjective criminal law, and so aims at an impossibility. The enormous scope of the book renders inexactness in detail almost an inherent necessity; but this does not excuse such grave

misstatements of law as we find at p. 176, where it is said that in the 'statement' of an indictment, 'any of the following when they are of the essence of the offence must be correctly set out. *Time*, as in . . . bigamy, murder, and all offences in which the indictment must be preferred within a certain time.' We cannot honestly recommend a work containing mistakes of which this is only a sample.

Inequalities of English Law as applied to Men and Women respectively. By A. W. COLSTON KNEE. Penzance: F. Rodda. 1906. 12 pp.—The writer advocates female suffrage, and ultimately the admission of women to Parliament, as the only certain remedies for the inequalities mentioned. We should like to know his authority for the statement (which we have seen before) that women had equal political rights with men before the reign of Elizabeth.

The Law of Torts. By J. F. CLERK and W. H. B. LINDBELL. Fourth Edition by WYATT PAINE. London: Sweet & Maxwell, Lim. xcvi and 880 pp. (30s.)—Review will follow.

A Treatise on the Law relating to Ownership and Incumbrance of registered Land. By JAMES EDWARD HOGG. London: Wm. Clowes & Sons, Lim. 1906. 8vo. xix and 474 pp. (20s. net.)—Review will follow.

The Rule against Perpetuities. By JOHN CHIPMAN GRAY. Second Edition. Boston, Mass.: Little, Brown & Co. 1906. La. 8vo. xlvii and 664 pp.—Review will follow.

A Treatise on the Law of Evidence. By His Honour the late Judge PITT TAYLOR. Tenth Edition by W. E. HUME-WILLIAMS. Two Vols. London: Sweet & Maxwell, Lim. 1906. La. 8vo. ccxlii, 1351 and 228 (index) pp. (£3 3s.)—Review will follow.

The Customs Laws. By NATHANIEL J. HIGHMORE. Published for H.M. Stationery Office by Stevens & Sons, Lim. 1906. 8vo. xxxvi and 383 pp. (6s.)

Stone's Justices' Manual; being the Justices' Yearly Practice for 1906. Thirty-eighth Edition. By J. R. ROBERTS. London: Shaw & Sons; Butterworth & Co. 1906. 8vo. cxliii and 1309 pp. (25s.)

The Law and Practice relating to Letters Patent for Inventions. By THOMAS TERRELL, K.C. Fourth Edition by COURTNEY TERRELL. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xxxviii and 689 pp. (30s.)

Trial of Dr. Pritchard. Edited by WILLIAM ROUGHHEAD. London: Sweet & Maxwell, Lim. 1906. 8vo. 343 pp. (5s. net.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS, J. G. PEASE and A. B. CANE. Vol. LXXX. 1847-1850 (16 Simons; 14 Queen's Bench; 4 Exchequer; 2 Carrington & Kirwan; 17 Law Journal). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1906. La. 8vo. xv and 888 pp. (25s.)

The Victorian Chancellors. By J. B. ATLAY. Two Vols. Vol. I. Lord Lyndhurst; Lord Brougham; Lord Cottenham; Lord Truro. With portraits. London: Smith, Elder & Co. 1906. 8vo. x and 466 pp. (14s. net.)

English and Roman-Dutch Law. Second Edition. By GEORGE T. MORICE. Grahamstown, Cape Colony: The African Book Company, Lim.; London: Butterworth & Co. 1905. 8vo. xxxi and 410 pp. (27s. 6d.)

The Civil Practice of the Magistrates' Courts in the Transvaal. By HARRY OSBOERNE BUCKLE. Grahamstown, Cape Colony: The African Book Company, Lim. 1905. 8vo. xlvi and 393 pp. (21s.)

A Treatise on the Law of Sale of Personal Property. By JUDAH PHILIP BENJAMIN, Q.C. Fifth Edition. By WALTER CHARLES ALAN KER and ARTHUR REGINALD BUTTERWORTH. London: Sweet & Maxwell, Lim. 1906. La. 8vo. clv and 1160 pp. (£2 2s.)—Review will follow.

A Treatise on Deeds. By ROBERT F. NORTON, K.C., assisted by R. H. DUNN and DIGBY L. F. KOE. London: Sweet & Maxwell, Lim. 1906. La. 8vo. lxx and 694 pp. (30s.)—Review will follow.

La Colpa nel Diritto Civile Odierno. By G. P. CHIRONI. 2^a edizione interamente rifatta. Vol. II. Colpa Extra-Contrattuale. Torino: Fratelli Bocca. 1906. La. 8vo. 748 pp. (l. 15.)

The Practice at Parliamentary Elections and the Law relating thereto. By D. WARD. Third Edition. By S. G. LUSHINGTON, assisted by F. J. COLTMAN. London: Butterworth & Co.; Shaw & Sons. 1906. 8vo. xxxv, 344 and 51 pp. (9s.)

The Law of Corporate Executors and Trustees. By ERNEST KING ALLEN. London: Stevens & Sons, Lim. 1906. 8vo. xv and 93 pp.

The A. B. C. of Parliamentary Procedure: a handbook for use in public debate. By WM. MARSHALL FREEMAN and J. CARSON ABBOTT. London: Butterworth & Co. 1906. 8vo. 127 pp. (2s. 6d. net.)

The Law of Heavy and Light Mechanical Traction on Highways. By C. A. MONTAGUE BARLOW and W. JOYNSON HICKS. London: Sir Isaac Pitman & Sons, Lim. 1906. 8vo. xv and 302 pp. (8s. 6d. net.)

Roman Private Law. By R. W. LEAGE. London: Macmillan & Co., Lim. 1906. 8vo. xiii and 429 pp. (10s. net.)

The London Building Acts, 1894 to 1905. By E. ABRAHAM COHEN. London: Stevens & Sons, Lim. 1906. La. 8vo. lxxiii and 444 pp. (25s.)

*The Editor cannot undertake the return or safe custody of MSS.
sent to him without previous communication.*

His address is 13 Old Square, Lincoln's Inn, not Oxford.

THE LAW QUARTERLY REVIEW.

No. LXXXVII. July, 1906.

NOTES.

THE profound respect rightly entertained by all English lawyers for the Supreme Court of the United States makes it impossible to read the full report of *Haddock v. Haddock* [1906] 26 Sup. Ct. Reporter, 525, with any other feeling than that of sheer amazement. That case decides that, to cite the headnote, 'the mere domicile within the State [namely Connecticut] of one party to the marriage [in the particular instance the husband] does not give the Courts of that State jurisdiction to render a decree of divorce enforceable in all other States [e. g. in New York] by virtue of the full faith and credit clause of the Federal Constitution [Art. IV, s. 1, cl. 1] against a non-resident who did not appear, and who was only constructively served with notice of the pendency of the action.' And this principle, which is strange enough in itself, is in the judgment delivered by the majority of the Court combined with another principle even more startling, namely, that a divorce may be valid in Connecticut, where it is given, whilst it is invalid in New York, though not necessarily in all other States of the Union. Hence seem to follow some curious conclusions. Thus *H* is a bachelor in Connecticut, but he may be a married man in New York; *W*, his wife, on the other hand, is a married woman at New York, but an unmarried woman in Connecticut; in Massachusetts again, the parts may be once more interchanged. Whether under these circumstances *H* is in any part of America, say in the district of Columbia, guilty of bigamy, if, as a citizen of Connecticut, he holds he has the privileges of a bachelor, and at Paris marries, during the lifetime of *W*, *Y* a Frenchwoman, we do not pretend to conjecture. What is the proper and legal behaviour of *H* who, according to the majority of the Supreme Court, occupies the ambiguous position of a husband who is not a husband, we must leave to be decided by the wisdom or the originality of Mr. Justice White and the colleagues whose views he represents. This inquiry, be it noted, is one which may any day

come before an English Court. It is impossible to examine with anything like thorough care the effect or bearing of a case whereof the full report has only just reached us. Many of the points raised, such for instance as the proper interpretation of the 'full faith and credit clause,' perplex even American lawyers and assuredly cannot be solved by any one except an American lawyer intimately acquainted with the constitutional law of the United States. It may, however, be allowable for an Englishman who has devoted some attention to the problems raised by the conflict of laws, to hazard several observations suggested by the first reading of *Haddock v. Haddock*.

1. The judgment of the Supreme Court carries great weight simply because it is the judgment of that high tribunal, but the force of argument, though not of numbers, seems to lie with the minority of judges, whose views are carefully elaborated by Mr. Justice Brown, and expressed with brilliant pungency by Mr. Justice Holmes.

2. The very idea of a divorce, which in the eyes of the Supreme Court itself is valid in Connecticut and invalid in New York, is so novel and so startling that it needs to be supported by the very strongest arguments, but a conclusion which can only with great difficulty find acceptance is unfortunately based in part upon the utterly untenable premiss that a judgment of divorce is analogous to a judgment *in personam* and not, as every jurist holds, to a judgment *in rem*.

3. It is one of the many astounding results of this amazing judgment that under the 'full faith and credit' clause, a Connecticut judgment apparently receives and ought to receive in the State of New York less respect than the same judgment would receive in England. The point is one of great importance, which ought to be worked out when the time comes for a fuller consideration of *Haddock v. Haddock*.

4. The majority of the Supreme Court were, we may suspect, influenced by two considerations which cannot affect an English tribunal. The one is the difficulty, which appears under the Constitution of the United States to be a real one, of reconciling the 'full faith and credit clause,' which must have been intended to make judgments pronounced in any one State effective throughout the whole of the Union, with the legislative authority almost (or, as some American publicists hold, quite) amounting to sovereignty which under the Federal Constitution was left for each State. The other is the natural indisposition to allow any one State to relax, in reality though not in name, the terms of divorce throughout the whole Union; it may well be thought undesirable that the divorce

law, say of South Dakota, should be the divorce law of the United States.

5. Englishmen may rejoice that our Courts have held almost unswervingly that divorce jurisdiction depends wholly upon the domicile of the husband at the time of the proceedings for divorce. The confused condition of the divorce law of the United States has not been created, though it has been still further complicated, by the judgment in *Haddock v. Haddock*. Its true origin is to be found in the doctrine, all but unknown to English law, that husband and wife may each have a separate domicile. A. V. D.

[The decision is quite as severely criticized by Mr. Joseph H. Beale, jun. in an article published in the June number of the *Harvard Law Review*, 19 *Harv. Law R.* 586.]

From *Bater v. Bater* [1906] P. 209, 75 L. J. P. 60, C. A., a student interested in the conflict of laws may draw with confidence several important conclusions.

First. The domicile for the time being of the married pair when the proceedings for divorce commenced affords the only true test of jurisdiction to dissolve their marriage, and the Court of such domicile has jurisdiction over persons originally domiciled in another country to undo a marriage celebrated in that other country whilst they were there domiciled, and the divorce will be recognized by English Courts even if the parties were originally married and domiciled in England and even if the divorce were granted for a cause which would not have been sufficient to obtain a divorce in England (judgment of Collins M.R. [1906] P. p. 232, and of Romer L.J. pp. 234-6). Thus if *H* an Englishman and *W* an Englishwoman, both domiciled in England, whilst so domiciled intermarry in England and afterwards obtain a domicile at New York, a divorce granted by a New York Court whilst they are domiciled in the State of New York will be held valid in England, and that even though it is granted for a cause, e.g. incompatibility of temper, which would not be a ground for divorce in England. This principle now clearly laid down by the Court of Appeal is in strict conformity with, but somewhat extends the effect of *Harvey v. Farnie* (1882) 8 App. Cas. 43; *Le Mesurier v. Le Mesurier* [1895] A. C. 517.

Secondly. The resolution of the judges in *Lolley's case* (1812), Russ. & Ry. 237, 37 R. R. 249, must be treated as confined to the particular facts of the case, in other words that case, as now interpreted, establishes nothing more than the sound and unquestionable principle that the Courts of a country where the parties are not domiciled have not jurisdiction, in the opinion of English tribunals, to dissolve either an English or any other

marriage. The resolution of the judges in *Lolley's* case has, to speak plainly, been at last so cut down, to the great improvement of the law, as to be no longer of any material importance.

Thirdly. A divorce granted by a foreign Court, being a judgment affecting the status of the parties, stands on the same footing as a judgment *in rem*. It therefore cannot be set aside in this country, even on the ground of fraud, by any person who was no party to the proceedings in which the judgment was pronounced. *Castrique v. Behrens* (1861) 30 L. J. Q. B. 163, is on this point approved (see judgment of Collins M. R. p. 228, and judgment of Romer L. J. pp. 236, 237).

The majority of the judges of the Supreme Court who decided *Haddock v. Haddock*, 26 Sup. Ct. Reporter, 525, may with the highest respect be asked to note the opinion of the Court of Appeal as to the nature of a judgment affecting status.

The judgment of the Court of Appeal in *Bater v. Bater* as to the points we have dwelt upon will, we anticipate, be received with general approval. The one matter which may excite some doubt is whether, it being granted that the New York Court had from an international point of view jurisdiction to grant a divorce, it was in any way incumbent upon an English Court to consider whether the New York tribunal had jurisdiction under the law of New York. On this point Romer L. J. expresses a doubt, citing *Pemberton v. Hughes* [1899] 1 Ch. 781, 791, which well deserves consideration. He might also have cited *Vanquelin v. Bouard* (1863) 33 L. J. C. P. 78, which, however, is not a judgment with reference to status.

A. V. D.

Armitage v. Attorney-General [1906] P. 135; 75 L. J. P. 42, decides, as far as an elaborate judgment of the President of the Probate Division can do so, two important points.

First. A divorce granted by the tribunals of a country, e.g. South Dakota, where the husband is not domiciled, will be valid in England if it would be held valid by the Courts of the country, e.g. the State of New York, where the husband is domiciled at the date of the proceedings for divorce, and this though the divorce is granted for causes which would not afford a ground for divorce either by the law of England or by the law of New York. This shows that our Courts interpret the term 'law of a country,' at any rate where the *lex domicilii* is in question, as meaning the law, whatever it is, which the Courts of a country where a party is domiciled hold applicable to the particular case (see Dicey, *Conflict of Laws*, pp. 75-78).

Secondly. The respondent in a divorce suit does not by appear-

ing absolutely and not under protest give the Court before which he appears jurisdiction. This doctrine which, though not necessary for the decision of the particular case, is laid down by Sir J. Gorell Barnes, is in principle sound, but overrules *Zycklinski v. Zycklinski* (1862) 2 Sw. & Tr. 420; 31 L. J. P. & M. 37, and *Callwell v. Callwell* (1860) 3 Sw. & Tr. 259, which cases do not appear to have been brought before the Court. Their application, however, to such a case as the present one was already questionable: Dicey, Conflict of Laws, 394, n. 1.

The scandalous condition of divorce law and procedure in certain States has long been under the consideration of the American Bar Association, but it has not yet been found practicable even to propose more than partial remedies.

After the warning in *Bonnard v. Dott* [1906] 1 Ch. 740, 75 L. J. Ch. 446, C. A., money-lenders will avoid the mistake of not registering themselves, however distasteful the notoriety may be. The situation resulting from non-registration is too one-sided to be regarded with anything like equanimity, coming as it does to this, that the money-lender cannot compel the borrower to refund the loan, while the borrower can compel the money-lender to restore the securities. An attempt was made to argue that clause (c) in s. 2 (1), providing that a money-lender 'shall not enter into an agreement in the course of his business as a money-lender with respect to the advance and repayment, or take any security for money in the course of his business as a money-lender otherwise than in his registered name,' applied only to a registered money-lender; but the argument was an argument of despair. As Cozens-Hardy L. J. remarked, if that was so, no money-lender would ever register. The policy of publicity is of the essence of the Act—to unmask the ostensible lender and let the borrower know with whom he is dealing—the 'unconscionable dog' as Moses describes him in the 'School for Scandal.'

On this point the situation is clear, but it is matter for regret that the case was not heard on its merits. We very much want to know authoritatively how far the Act was meant to relieve borrowers who were in a position to make their own bargain on terms of equality with the money-lender, merely because they have had to pay or chosen to pay a high rate of interest for the accommodation.

Borrowing on floating debentures is such an easy matter in these days that a company naturally never stops business while it can raise fresh funds in this way, and so long as it is a going concern

there are always persons ready to supply goods to it on credit. But sooner or later an unprosperous company exhausts its borrowing power and the unsecured creditors awake to find that all the assets are intercepted by the debenture-holders' charge. No doubt it is a grievance, though it is difficult to acquit the unsecured creditors of rashness in trusting too credulously to the solvency of the company, for they have the means now of ascertaining to what extent the company has charged its assets, and they ought to use such means. The question—arising out of the situation—which has lately been discussed in a number of cases (*Re Chic, Lim.* [1905] 2 Ch. 345, 74 L.J. Ch. 597; *Re Alfred Melson & Co., Lim.* [1906] 1 Ch. 841, and *Re Crigglestone Coal Co.* [1906] 1 Ch. 523, 75 L.J. Ch. 307, 75 L.J. Ch. 509, affirmed W. N. [1906] 126) is whether on a creditor's petition the Court ought to make a winding-up order, when to all appearance the debenture-holders' security will exhaust the assets, and the winding-up produce nothing to satisfy the petitioner's debt. The result of the cases may be summed up by saying that there must be very strong evidence indeed that a winding order will be barren of results to displace the petitioner's *prima facie* right *ex debito iustitiae* to have the company's assets administered for his and the other unsecured creditors' benefit. There is never any knowing what assets the winding-up machinery may produce. The validity of the debentures may be challenged, moneys may be recovered from promoters, or misfeasance damages from directors, the liquidator's intervention in the debenture-holders' action may help to secure a more advantageous realization of the company's property. Whatever can be got the unsecured creditors ought to get it, and it is not easy to see what the rationale of the opposition to a winding-up order on this ground is. The company has no defence to its creditor's claim; the debenture-holders are not concerned, for their rights are not affected; and as to costs, the official receiver acting as liquidator is too discreet to incur them unless they are likely to be fruitful.

Certain members of the Hurlingham Club objected to a resolution to discontinue pigeon-shooting at the club grounds which had been duly passed by a general meeting according to the terms of the rules; but they failed to convince the Court that pigeon-shooting, although it was the only object specified in the original rules of 1868, was a fundamental object which the club had no power to abandon: *Thellusson v. Viscount Valentia* [1906] 1 Ch. 480, 75 L.J. Ch. 368. An intelligent layman might conclude from the perusal of this case that Joyce J. found the Hurlingham Club entitled to greater freedom in the conduct of its affairs than the House of Lords

allowed to the Free Church of Scotland. We presume that a lawyer ought to be able to explain to such a layman why both decisions are right, but we do not presume to say how it can be done.

The cases on reconstruction are gradually making a body of law on the subject outside the statutory provisions for reconstruction contained in s. 161 of the Companies Act, 1862, and the Joint Stock Companies Arrangement Act, 1870. The difficulty in these cases is mostly caused by the dissentient shareholder. The new company must have fresh capital to go on with—that is generally the very object of reconstruction—and in order to get it the sale is made for part-paid shares, so that the buying company can make calls; but this fresh demand for money is just what a number of the shareholders who have paid up their shares in the old company object to. They look upon it as throwing good money after bad, and prefer to take out their interest in the company in cash, as they are entitled to do when the sale is under s. 161. This of course does not suit the new company, which wants to receive, not to pay. So the reconstruction clauses of companies' Memorandums of Association have been drafted with a view to coerce them. 'Here,' says the selling company to its dissentient shareholders, 'are part-paid shares in the new company offered you as consideration for your interest. If you do not choose to accept them, you forfeit your interest for the benefit of the new company.' This was the scheme in *Manners v. St. David's Gold and Copper Mines, Lim.* [1904] 2 Ch. 593; and in *Bigood v. Nile Valley Co.* [1906] 1 Ch. 747, 75 L. J. Ch. 379, and in both cases the Court has disallowed the device. The scheme in *Fuller v. White Feather Reward, Lim.* [1906] 1 Ch. 823, 75 L. J. Ch. 393 was materially different. The part-paid shares in the new company were to be offered to the shareholders in the old company, but if they declined them the new company was to sell them for what they would fetch and distribute the proceeds among the dissentients in the proportion of their holdings. Warrington J. saw nothing *ultra vires* in this, though he pronounced no opinion on its fairness. It is indeed extremely difficult to get at what is fairness in such a case. Arbitration generally puts the value of the dissentient shareholder's interest too high, the market price, if there is one, too low. To get the company and the dissentient to agree the value is almost hopeless.

This will probably be known as the Photographic Age as other ages have been known as the Palaeolithic or the Neolithic. The photographer is abroad, trading on human vanity and the morbid love of notoriety. When a person's photograph has a market value

it is usually the photographer who solicits a sitting, and when he does, and the 'celebrity' grants it, the copyright belongs—speaking generally—to the photographer: the popular actress tripping upstairs and dropping into a chair does not make the photograph one taken 'for or on behalf of' her 'for a good or valuable consideration' within the meaning of s. 1 of the Fine Art Copyright Act of 1882 (*Ellis v. Horace Marshall & Son*, 64 L. J., Q. B. 757). But a little more trouble taken may, as *Stackemann v. Paton* [1906] 1 Ch. 774 shows, turn the scale and constitute a 'good' consideration—'good' and 'valuable' in the section being, it seems, not synonymous—and give the copyright to the sitter. A travelling photographer calls at a school and offers to take photographs of the school 'entirely at his own risk,' meaning thereby that the schoolmaster need not take any copies unless he likes. The schoolmaster, wishing to have photographs of the school, permits the photographer to go all over the premises, collects the boys for groups, indicates the points of view he wants taken, and generally renders every assistance he can, and when the photographs are finished he takes £15 worth. Afterwards the schoolmaster sends some of the photographs for reproduction in the well-known work—Paton's 'List of Schools.' The photographer registers the photograph and sues Paton for infringement of his copyright. Was it his, or was the photograph taken 'for or on behalf of the schoolmaster for a good or valuable consideration'? Farwell J. (now L. J.) has held that in such a case the schoolmaster permitting the photographer to go all over the house, and otherwise assisting and superintending the process, does constitute a 'good consideration.' Schoolmasters—and *a fortiori* schoolmistresses—might very well object to a photographer having the right to sell photographs of their school premises and domestic arrangements without their consent. At the same time they are not likely to withhold their consent to the photographer making a profit by the sale of photographs redounding to their credit. We have only to regret that the object of the Act was not attained by the use of language consistent with the ordinary usage of lawyers. Except in the one case, we believe, of a covenant to stand seised, the general law knows nothing of any difference between 'good' and 'valuable' consideration.

Dr. Gross has reprinted from the Quarterly Journal of Economics (Harvard) an interesting article on the Court of Piepowder, which seems to contain everything that is known. There is one small injustice to Spelman, and possibly to Cowell also. Spelman should not have been named among the writers who erroneously believed the

Court of Piepowder to be so called 'because justice was administered as speedily as the dust could fall or be removed from the feet of the litigants.' In fact Spelman correctly says that 'pieds pouldreux' 'transeuntes significat, et vagabundos, qui ideo pedes minus tersos habent sed pulvere squallentes.' Neither are we sure what Cowell's belief was, for his language is exceedingly confused, but we suspect that Coke's confident blunder may have arisen from a misunderstanding of Cowell. This, however, is of no importance. Dr. Gross plausibly suggests that the Courts of Piepowder, being many and frequently held, not only had much to do with the development of the law merchant in England, but were not without influence on the introduction of proof by witnesses in the superior courts.

In the current Law List thirty-seven Mahometan members of the Bar are indexed under 'Khan': which is just as if an Indian clerk should index a number of English barristers under 'Esquire.' The fact that Moslems have no family names makes it, no doubt, rather troublesome to find the best index order for them; but surely it is not a reason for subordinating their names to a mere honorific affix which is not a name at all.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE KATHIAWAR JURISDICTION CASES¹.

THE record of the arguments on which these two appeals were founded, and of the reasons upon which the Privy Council dismissed them, is of some interest, historically and politically. It illustrates the complicated relations still existing between the British Empire and the subordinate Native States in India, and the curious forms of divided sovereignty that have grown up out of the condition of certain parts of the country at the time when our dominion was established. Up to the beginning of the nineteenth century the Maratha power was still predominant in central and western India. The Maratha armies had overrun and brought into subjection a number of minor principalities, from which they were content to exact tribute, leaving the hereditary chiefs otherwise in possession. In Kathiawar they had found a group of very petty chiefships, which were made over to the special management of the Gaekwar, one of their principal military leaders, who collected the tribute, and, after reserving for himself a substantial share, accounted for the surplus to the Peshwa as the supreme head of, or at least the predominant partner in, the Maratha confederation.

In the first years of the nineteenth century the British and the Maratha powers came into decisive collision. The Maratha armies were defeated in the field; the Maratha confederation was dissolved, and the Peshwa, with the other leading confederates, acknowledged the British supremacy. The Peshwa ceded all his revenue rights in Kathiawar to the British Government, on whom devolved, in consequence, the duty of arranging the relations between the Gaekwar and the tributary chiefships. It was impossible, if peace and order were to be preserved, to abandon them to the mercy of their Maratha overlord, with whom they were incessantly quarrelling over the revenue demands, which had always been levied on the general rule of taking as much as could be got. So in a series of transactions extending from 1807 to 1820 the British authorities interfered as arbitrators, fixed the payments to be made by each chief to the Gaekwar, withdrew all these domains from his jurisdiction, and placed them under the protection of the supreme British power, to whom all future disputes were to be referred. The process was the reverse of what was done in Germany

¹ *Hemchand Deschand v. Asam Sakarlal Chhotamlal and Taluka of Kotda-Sangani v. State of Gondal*, L. R. 33 Ind. App. 1, [1906] A. C. 212.

at nearly the same period, after Napoleon's wars had broken up the ancient constitution of the Empire. There the petty jurisdictions and miscellaneous principalities of the lesser sort were mediatized—that is, they were absorbed into, and made subject to, the larger independent kingdoms and electorates; they were no longer directly under the superior sovereignty of the Emperor. In India we *immediatized* the chiefships, we set aside the intermediate domination of the Marathas; and we placed them directly under the British protectorate, liable only for the payment, through the Imperial treasury, of the sums which had been settled as the proper tribute due to the Gaekwar. Our policy was to safeguard and strengthen the independence of these subordinate States, securing them as our clients, and limiting at the same time the power of the Marathas.

But the management of this little cluster of States in Kathiawar was found to be particularly troublesome. They quarrelled interminably among themselves over boundaries and rights; the internal disputes about succession and the division of hereditary property were perpetual; they were often heavily in debt to money-lenders, the chiefs were incapable of administering the police or of doing justice tolerably. The supreme government was forced to interfere for the regulation of these matters up to a decent level of efficiency. To leave these patches of territory, which are mere spots on the broad enveloping area of British India, without any definite guidance or superior direction that might abate misrule and confusion, would have been to allow them to fall into ways that eventually lead a native State to destruction. Native opinion in India, which is inordinately suspicious, has more than once hinted that the British Government stands aside while a State's internal affairs go from bad to worse, until incurable dilapidation leaves no remedy but annexation. It was the object of the Government to preserve as well as to protect these chiefships. Political agents were appointed to act as judges, to hold courts, and to apply British law so far as it was applicable to the circumstances. They heard appeals, decided knotty legal points to the best of their ability, introduced regular procedure, and in criminal cases modified barbarous sentences and checked injustice and corrupt practices. They did their best, in fact, to shape litigation and judicial procedure after the model of the system prevailing in British India. The final appeals lay to the Governor in Council of Bombay, and ultimately to the Secretary of State for India in Council.

In the cases now reported the appellants were dissatisfied with the decisions of the Bombay Government, and claimed, as of right, that their appeals should be heard by the Privy Council. Their first plea was that Kathiawar was not foreign territory at all, that

certain acts, orders, and transactions on the part of the British authorities effectually proved that it had been regarded and dealt with as British territory. But this argument failed, because the evidence of formal declarations proved that the country was not included within the boundaries of British India. Secondly, they pleaded that the Courts of the Political Agents were British Courts exercising jurisdiction in Kathiawar, that they were set up by the King, like any other Courts, so that an appeal from their orders lay to the King's Council. Here again it was proved that these Courts had been established by a compact between the chiefs and the British political authorities, that they were introduced by a simple notification of the executive government, that this was no more than a measure of political expediency, by which the chiefs were induced to make over to the superior power certain departments of administration, reserving other departments equally important, such as the police, the collection of revenue, and the coinage. In short, we have here an example of divided sovereignty; and the Privy Council has rightly determined that the cession of some attributes by a ruler in no way involves his forfeiture of the whole.

It is fortunate that the judgment was delivered by a member of the Privy Council whose Indian experience enabled him to unravel and lay out the true character of these Kathiawar jurisdictions, their origin and historical evolution, because the decision is of real political importance, not so much to the British Government as to the native chiefs throughout India. The appellants contended that for many years past the British Government had interfered in these territories to an extent sufficient to show that it had practically assumed sovereignty in Kathiawar, whereby the chiefs had been reduced to the status of mere heads of villages entrusted with a limited jurisdiction under British supervision; that the Governor-General had used his prerogative to bring the country by various acts and measures within British India, and had effectively done so.

This is indeed a doctrine fraught with peril to all the Native States of India. The British dominion has been extended by various methods, and on diverse principles of policy; but the process of annexing independent territory by the pacific penetration of British law and procedure has not hitherto been counted among them. The Courts were established in Kathiawar for the purpose of preserving the States from suicidal mismanagement. To use them as instruments of absorption, as evidence that the chiefs, by assigning to their political superior certain attributes of sovereignty, had virtually surrendered all the rest, would have been regarded by the chiefs as a flagrant breach of the original compact, and by all the Native States in India as an indefensible stratagem. It would

probably have put a stop to any further concessions or compacts of the kind for the future. At present a chief who lacks either the power or the capacity to check disorder within his lands, or to manage his own affairs, permits an agent of the supreme Government to remodel his administration, to put down unruly factions with a strong hand, to organize and improve, in the sure confidence that the work is done for his benefit, and that the British agent is acting in his name, and with his consent. But if the doctrine were to prevail that these concessions might be fatal to his independence, that they were undermining his sovereignty, and that the Governor-General's benevolent interposition covered a design of removing his neighbour's landmarks, he would certainly be on his guard against any such arrangements for the future. He might be likely to inquire why the principles of equity and good conscience, which the Courts established in his country were supposed to inculcate, had not been found applicable to the dealings of the British Government with defenceless States under its protection.

A. C. LYALL.

FUTURE INTERESTS IN LAND.

I.

IN a recent article in this REVIEW¹ Mr. Edward Jenks suggests that in 1840, before the commencement of modern English legislation on the subject, 'future interests in land could be limited in two ways, viz. the way of *succession* and the way of *interruption*.' In a still more recent article² he declares that in using this terminology he was 'careful to select words which should remind us of essentials rather than accidentals.' This would seem to indicate that the learned writer believed that he was putting forward a suggestion for a new and more rational classification of future interests in land.

Mr. Jenks did not, however, carry his reclassification farther than to use future interests by way of succession as descriptive of remainders, and future interests by way of interruption as descriptive of executory interests, viz. springing and shifting future interests. It is believed that if, as seems to have been claimed, the suggestion made is to be the basis for a more rational classification of future interests, a thorough reclassification pursuant to it ought to be undertaken. It is apparent that only by such a course can the value of Mr. Jenks's suggestion be finally tested. The writer, therefore, proposes to undertake in Part I of this article the humbler duty of making a thorough reclassification of all future interests in land from the point of view of Mr. Jenks's suggestion. In Part II an attempt will be made to show how the analysis of future interests as developed in Part I throws light upon the distinction between vested and contingent remainders.

PART I.

A RECLASSIFICATION OF FUTURE INTERESTS IN LAND.

INTRODUCTORY. Before entering directly upon this proposed reclassification of future interests in land two preliminary matters must be settled. How are future interests by way of succession and interruption to be defined? What is to be the aim and purpose of the attempted reclassification?

A future interest takes effect by way of succession when it comes into possession, if at all, whenever and however the preceding

¹ xx. 280.² L. Q. R. xxi. 265.

estate may determine, otherwise than by being prematurely cut short by the expressed provision of the settlor. Thus, to *A* for life and then to *B* and his heirs. Here *B*'s interest takes effect in possession by way of succession. If the limitations be to *A* for life and then to *B* for life, *B*'s interest may never take effect at all, because *B* may not overlive the termination of *A*'s life estate, but *B*'s interest, if it takes effect at all in possession, is bound to do so by way of succession. If the interest be limited to *A* for life and then to *B* in fee, but if *B* does not survive the termination of *A*'s estate, then to *C* and his heirs, *B*'s interest is still bound to take effect, if at all, by way of succession. The same is true of *B*'s interest where the limitations are to *A* for life and then, if *B* survive the termination (whenever and in whatever manner it may occur) of *A*'s interest, to *B* and his heirs. Even if, after a life estate to *A*, a future interest be limited to the heirs of *B* with the express *proviso* that the heirs of *B* must be ascertained before the termination, whenever and in whatever manner of *A*'s life estate, *B*'s heirs have an interest by way of succession. A future interest, on the other hand, takes effect by way of interruption when it is limited so that it will come into possession by way of interruption or cutting short of the preceding interest expressly limited, or a reversionary interest in fee. Future interests by way of interruption, therefore, include what are usually known as springing and shifting future interests.

The acceptance of a classification as worth while depends, assuming it to attain the object sought to be accomplished, on the relative importance of that object. The aim and purpose of the classification about to be attempted is to furnish a more convenient means of determining the validity of all future interests. It is an effort not only to catalogue those which are valid and those which are invalid, but to do so by means of such general expressions as will indicate to an appreciable extent on the face of the classification the reason why the future interest is valid or invalid. This is precisely the sort of thing which Mr. Jenks has done when he reminds us that future interests by way of succession after a particular estate of freehold (i. e. remainders) were valid at common law, while future interests by way of interruption were not.

The precise scope of our first principal inquiry then is this: How far were future interests by way of succession valid at common law, and how far were future interests by way of interruption invalid under the same system? How far are both sorts of future interests valid under conveyances by use or devise? How far was the fact that a future interest took effect by way of succession or interruption an essential element in determining its validity or invalidity?

A.

COMMON LAW OR FEUDAL FUTURE INTERESTS.

I. BY WAY OF INTERRUPTION. So far as future interests attempted to be limited by way of interruption to one other than the feoffor were concerned, the feudal system of land law certainly accorded them no recognition. In short, what we know of as springing and shifting future interests were absolutely void. On the other hand, if the future interest taking effect by way of interruption, if at all, were created in favour of the original feoffor, it was valid. The interest, however, was inalienable and could be taken advantage of only by the feoffor or his heirs¹. It was known historically by the name of a Right of Entry for Condition Broken².

II. BY WAY OF SUCCESSION—*Arising by operation of law*. The common law or feudal future interests taking effect by way of succession and arising by operation of law included possibilities of reverter, reversions, and resulting interests after terms for years. These were all reversionary interests left by operation of law in the transferor upon the conveyance of less than a fee simple. Possibilities of reverter were reversionary interests after the transfer of a fee simple, which was limited to expire upon the happening of some event in the future³. A reversion was what was left in the transferor upon the conveyance of a freehold estate less than a fee simple. A resulting interest after a term for years was what was left by operation of law in the transferor upon a lease for years⁴. All these interests were bound to take effect, if at all, by way of succession.

Possibilities of reverter were recognized as valid before the Statute of *Quia Emptores*. Whether since then they could properly exist has recently been a matter of much discussion⁵. As to reversions and resulting interests after terms for years, they have always been recognized as valid. Observe also that it made no difference

¹ Gray's Rule against Perpetuities, 1st and 2nd ed., s. 12.

² If, as some writers have contended (*Determinable Fees*, by H. W. Challis, 3 L. Q. R. 403; Challis, *Real Property*, 2nd ed., 398), so-called possibilities of reverter persisted as valid future interests after the Statute of *Quia Emptores*, it is submitted the future interest became one which took effect by way of interruption in favour of the feoffor.

³ Gray's Rule against Perpetuities, 1st and 2nd ed., s. 13.

⁴ These last are often spoken of as reversions. They are, however, given a definite name here out of deference to Challis's suggestion that they cannot properly be called reversions (Challis, *Real Property*, 2nd ed., p. 70). The reason for this seems to have been that the so-called reversion after a term is a present freehold.

⁵ L. Q. R. iii. 399, 403: Articles by Professor Gray and Mr. Challis. See also Gray's Rule against Perpetuities, 1st and 2nd ed., ss. 13, 31-42; and 2nd ed., ss. 774 et seq.

if the future interest by way of reversion might never come into possession at all—that is, that it was contingent. Thus, if the limitations were to *A* for life and then to *B*'s heirs, there was a reversion in the transferor which, after the gift to *B*'s heirs was recognized as valid at all, never took effect in possession if *B* died before *A*'s life estate had terminated. Here if the condition ever affects the transferor's reversion at all, it will prevent it from coming into possession. It will never divest it after it has once come into possession. At first apparently it was not conceded that there was any reversion in such a case¹. In accordance with this opinion the fee was really in abeyance, but the more modern view is the other way—that what has not been disposed of must remain to the feoffor or transferor as a reversion in fee².

By Act of the Parties—(a) *After a particular estate of freehold.* Certainly the validity of the future interest was clear if it was sure to take effect some time, and when it did so was bound, according to the expressed intent of the settlor, to do so by way of succession. Thus, to *A* for life, remainder to *B* and his heirs.

Suppose, however, the future interest after the particular estate of freehold, while bound by the expressed intention of the settlor to take effect, if at all, by way of succession, was not sure ever to take effect, because it was in fact subject to a condition precedent.

It is believed that so long as the condition precedent was not expressed at all, or if expressed, was in form a condition subsequent, the future interest was recognized as valid. For instance, in the limitations to *A* for life and then to *B* for life, *B*'s interest is not certain ever to come into possession, because he may die before *A*, but if it does, it must do so by way of succession. So, where the limitations are to *A* and the heirs of his body with remainder to *B* and his heirs, *B*'s interest is not certain to come into possession, because by a recovery or fine the estate tail and the remainders dependent upon it could be barred, but if it does, it must do so by way of succession. So, if the limitations be to *A* for life, remainder to *B* and his heirs, but if *B* dies before the termination of *A*'s life estate, then to *C* and his heirs, *B*'s interest is clearly subject to a condition precedent in fact. It is, however, so limited that if it takes effect at all it must do so by way of succession.

Suppose now that the same conditions precedent are expressed as in form precedent. For instance, suppose the limitations be to *A* for life, and then if *B* overlive the termination of *A*'s life estate to *B* for life; or to *A* and the heirs of his body, but if *A* die without

¹ Co. Lit. 342 b.

² Fearn, C. R. 361; Williams, Real Property, 17th Int. Ed. 413, 414; *Contra* Prest. Abst. 100-107.

issue, and neither *A* nor the heirs of his body do any act to bar the estate tail and the remainder dependent upon it, then to *B* and his heirs. In the same way, if the gifts be to *A* for life, and if *B* survive the termination of *A*'s life estate (whenever and however it may come to an end) then to *B* and his heirs, *B*'s interest is subject to a condition precedent in fact and in form, but it must take effect, if at all, by way of succession. The same may be said of the gift to the right heir of *J. S.* where the limitations are to *A* for life and after *A*'s death to the right heir of *J. S.*, provided said right heir of *J. S.* be ascertained before the termination (whenever and in whatever manner) of the preceding estate. Whether the strictly feudal law recognized the validity of the future interest in these cases is a fact of history in regard to which the writer has no knowledge. It would, however, seem strange that where the validity of the future interest was involved a difference should be made between the case where the future interest was subject to a condition expressed as precedent in form and where it was subject to the same condition expressed as subsequent in form.

There is a further reason which appears to be very convincing in favour of the view that the real feudal ground for holding valid the future interest in the above cases was that it was bound to take effect by way of succession, and had nothing to do with whether the condition expressed was precedent or subsequent in form. As early as 1430 a future interest after a particular estate of freehold limited upon such a condition that it might, according to the expressed intention of the settlor, take effect by way of succession or interruption according as the event upon which it was limited occurred before or at the time of or after the termination of the preceding estate, was held valid provided it in fact took effect by way of succession. Otherwise it failed. Certainly if the law was ready at that time to allow a future interest which might take effect by way of succession provided it did so, it would have been ready at perceptibly earlier time to have allowed it when the expressed intention of the settlor required it to take effect by way of succession or not at all. Suppose, for instance, the remainder after a freehold interest to preserve contingent remainders had been invented before the Statutes of Uses and Wills¹. Thus, suppose a feoffment to *A* for life, and after the determination of the preceding estate by forfeiture or otherwise, in the lifetime of *A*, to *B* and his heirs during the life of *A*, remainder to the heirs of *C*. Here the

¹ It appears that the device of giving the freehold to trustees to preserve contingent remainders was not invented until the middle of the seventeenth century: *Garth v. Cotton*, 1 Dick. 183, 188, 191; 1 Ves. Sr. 524; 1 Jurid. Soc. Papers, 53-5 (Gray's Rule against Perpetuities, 1st and 2nd ed., s. 192, n. 2).

estate to *B* is subject to a condition precedent in fact which is expressed as precedent in form, and yet it is believed that the feudal or common law of land would have held it a valid future interest, because it was bound to take effect in possession, if at all, by way of succession. If it can be laid down as a general principle of feudal land law that all future interests which are bound to take effect, if at all, by way of succession after a particular estate of freehold are valid even though subject to a condition precedent in fact and expressed as precedent in form, then a long step will have been taken in justification of Mr. Jenks's assertion that the fact that a future interest took effect by way of succession was an 'essential' rather than an 'accidental' circumstance.

(b) *After terms for years.* The difficulty from the feudal point of view with recognizing the validity of a freehold after a term for years was that it was apparently a freehold to begin *in futuro*. It was apparently limited to take effect after a certain number of years without any freehold to support it. There was, therefore, either a complete gap in the seisin, or, as we would now say, there was before the contingency happened a reversion in the settlor, and the freehold would take effect by way of interruption of such reversion. In either view there was a fatal objection to the validity of the future interest at common law. If, however, the interest after the term could be regarded as an immediate present freehold, all objection to it disappeared. There was then no gap in the seisin and no reversion to be interrupted. The freehold after the term was, therefore, valid, provided it could be regarded as a present freehold interest. Curiously enough the test for determining whether the freehold after the term could be regarded as a present interest seems to have followed closely the question as to whether it was bound to take effect, if at all, in possession by way of succession after the term. For instance, if the limitation after the term was sure to take effect some time, and when it did so was bound by the expressed intention of the settlor to do so by way of succession, it was clearly a valid present freehold interest subject to a term. That was most clearly true of the interest in *B* where the limitations were to *A* for ten years and then to *B* and his heirs¹. One case in particular indicates very clearly that the fact that the future interest after a term is bound to take effect by way of succession is the basis for holding it valid. If a feoffment is made to *A* for the term of twenty years, if he so long live, and after *A*'s death to *B* and his heirs, *B*'s interest was void². On the other hand, if the feoffment was to *A* for ninety-nine years, if he so long

¹ Leake, Digest of Land Law, 326.

² Ibid. 327.

live, and at *A*'s death to *B* and his heirs, *B*'s interest was valid¹. There is only one line of distinction between these two cases. In the first *B*'s interest is not sure to take effect by way of succession. If *A* outlives the term, *B*'s interest must take effect by way of interruption. In the latter case, however, *B*'s interest is, on account of the practical certainty that *A* will not outlive the term and by construing the words 'at *A*'s death' to mean 'at *A*'s death or sooner termination of the term,' sure to take effect by way of succession².

Suppose, however, the interest after the term is not sure ever to take effect in possession, because subject to a condition precedent in fact, but if it does so it must, by the expressed intention of the settlor, take effect by way of succession. Here, because of the actual existence of a condition precedent to the taking effect of the freehold, it is proportionately more difficult to say that there is no gap in the seisin or no interruption of the reversion in the settlor. And yet, the interest after the term seems, even in this case, to have been held valid. Thus, so long as the condition precedent is not expressed at all, or if so, is expressed as a condition in form subsequent, it seems that the interest after the term may be treated as a present interest, and is valid. Thus, if the limitations be to *A* for ten years and then to *B* for life, *B*'s interest is clearly valid³. So, if the limitations are to *A* for ten years and then to *B* and his heirs, but if *B* die before the termination of *A*'s interest, then to *C* and his heirs, it is submitted that *B*'s interest would be valid.

Suppose, now, that the condition precedent in fact be expressed in form as a condition precedent, can it still be said that the interest after the term is valid? As an original question, the writer would have supposed that while the case was in fact no different from that where the precedent condition was expressed as in form subsequent, yet those actually guiding the development of the feudal land law might well have said that there was relaxation enough where the condition was expressed as subsequent in form, and that there should be no further relaxation where the condition was precedent in fact and expressed as precedent in form. Nevertheless, the actual decision in *Smith d. Dormer v. Packhurst*⁴, and the effort of eminent writers to support it on principle⁵, almost compels the

¹ Leake, Digest of Land Law, 327; *Napper v. Sanders*, Hutt. 118 (5 Gray's Cases on Property, 48).

² The reasoning upon which the validity of *B*'s interest is sustained has always been substantially this, though the word 'succession' has not been used (Fearne, C. R. 21).

³ Leake, Digest of Land Law, 327.

⁴ 3 Atk. 135, 5 Gray's Cases on Property, p. 55; Fearne, C. R. 220.

⁵ Challis, Real Property, 2nd ed., 133-6.

conclusion that the interest after the term was valid, even where the condition precedent existed in fact and was expressed as in form precedent. In that case the limitations were in substance to the use of *A* for ninety-nine years, if he should so long live, and from and after the death of *A* or sooner determination of the estate limited to him for ninety-nine years, to the use of trustees and their heirs during the life of the said *A* upon trust to preserve contingent estates, and at the expiration of the said term to the use of the first and other sons of *A* successively in tail male, with divers remainders over. *A* having come into possession of the term for ninety-nine years and having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *praecipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards *A* died without leaving any other son. The next surviving remainderman made his actual entry within five years, and the question was: Whether the recovery had barred his remainder? This point depended entirely, as Fearne says¹, on another question: Whether the freehold was in the trustees during the life of *A* or not? If it was, the recovery was not well suffered for want of a good tenant to the *praecipe*, and consequently did not bar the remainder; but if the trustees had not the freehold, then it was in the son, and of course he was capable of making a good tenant to the *praecipe*, and the recovery in that case was well suffered. The question, therefore, was not really whether the trustees to preserve contingent remainders had a vested or contingent estate, but whether the interest in the trustees was a present freehold, or a future interest valid, if at all, as a springing use, which might in certain events become a present freehold in possession. The court held the estate in the trustees was a present freehold interest. This means that if such an estate had been created before the Statute of Uses in a settlement by way of feoffment to *A* for ninety-nine years, if he so long lived, and from and after the death of *A* or other sooner determination of the estate limited to the said *A* for ninety-nine years, to *B* and his heirs during the life of the said *A*, *B*'s interest would have been valid as a present freehold. The only explanation of this is that the interest after the term for years, though actually subject to a condition precedent, and expressed in form as precedent, is valid because it is so limited that it is bound according to the expressed intention of the settlor to take effect, if at all, by way of succession.

III. BY WAY OF SUCCESSION OR INTERRUPTION—after freeholds.

¹ Contingent Remainders, 220.

Future interests of this sort include all those which are limited after a particular estate of freehold on an event which may happen either before, or at the time of, or after the termination (whenever and in whatever manner) of the preceding interest. Thus, if the limitations be to *A* for life and then to *A*'s eldest son, provided he attain the age of twenty-one, and no matter whether he does so attain that age before, or at the time of, or after the death of *A* or sooner termination of *A*'s estate, we have most clearly a case where the event upon which *A*'s eldest son will take may, according to the expressed intention of the settlor, happen either before, or at the time of, or after the termination of the particular estate. If the limitations are to *A* for life and then to *A*'s eldest son when he reaches twenty-one, we have precisely the same case. The expressed intention is the same. The form or emphasis of the language only is different¹. If the limitations are to *A* for life and then to all the children of *A* and *B* who are living at the death of the survivor of *A* and *B*, it is clear that the event upon which the future interest is limited may occur at the time of, or after the termination of *A*'s life estate. The situation is exactly the same if the limitations are to *A* for life and then to such children of *A* as survive him. Here also the future interest to the surviving children is limited upon a condition which may happen at the time of the termination of *A*'s life estate or subsequent to it. So, if the limitations be to *A* for life and then to the heirs of *B*, the heirs of *B* may be ascertained either before or after the termination of *A*'s life estate. In all these cases then, the future interest clearly must take effect by way of succession or interruption according as the event upon which it is limited happens before, or at the time of, or after the termination of the preceding interest. If it happens before or at the time of the termination of the preceding estate, the future interest will take effect by way of succession. If it happens after the termination of the preceding interest, then the future interest will take effect by way of interruption of a reversion which has come into possession.

Future interests of this sort were originally wholly void according to the feudal or common law system of land law, and so remained absolutely void down to about 1430. Was this result reached because the future interest, if given effect according to the expressed intention of the settlor, was contingent, or because it might possibly take effect after a gap in the seisin or by way of interruption of a reversionary freehold which had come into possession? It is submitted that the latter is the real reason. This, it is believed,

¹ This point was fully dealt with in a former article entitled *Contingent Future Interests after a Particular Estate of Freehold*, L. Q. R. xxi, 118; see also 19 H. L. R. 546.

appears very clearly from the fact that when the future interest came after 1430 to be held valid at all, it was upon the condition imposed by the law and partially defeating the intention of the settlor, that the future interest take effect in possession by way of succession, or fail entirely—that is to say, the condition upon which such future interests were limited must happen before, or at the time of, the termination of the particular estate in order that the future interest might take effect in possession at all.

After terms for years. The future interest which might take effect by way of succession or interruption after a term for years was originally void for exactly the same reason that a similar sort of future interest after a freehold was held void. In both cases the fee was not wholly disposed of at once. If there was no resulting freehold in the settlor before the event happened upon which the future interest was to take effect, then there was a gap in the seisin. Assuming from the modern point of view that there was such a resulting freehold, then the future interest took effect by way of interruption of a freehold in possession. In either case there was a fatal objection to the validity of the future interest from the feudal point of view. When the future interest was limited after a freehold the feudal objections were entirely obviated by the rule which required the future interest to take effect by way of succession or fail entirely. After this requirement there could be no gap in the seisin and the interruption of a possible reversion was not the interruption of a freehold in possession. The objection that the fee was not entirely disposed of was, so far as it meant anything other than that there might possibly occur a gap in the seisin, ignored. A rule that the event upon which a future interest after a term is limited must happen before or at the time of the termination of the term, or the future interest would fail entirely, would have overcome the objection that a reversionary interest in possession would be cut short. It would not, however, dispose of the objection that there was a gap in the seisin. A term was a chattel interest, and the gap in the seisin, if it occurred at all, must therefore have begun at once where the preceding interest was a term, while when it was a freehold the gap occurred, if at all, only after the termination of a particular estate of freehold.

B.

FUTURE INTERESTS BY WAY OF USE OR DEVISE AFTER THE STATUTES OF USES AND WILLS.

I. BY WAY OF INTERRUPTION. In conveyances operating under the Statutes of Uses and Wills it became possible to create valid future

interests in strangers which took effect, if at all, only by way of interruption. In short, by conveyances to uses or by devise, springing and shifting interests could be created. At first, on some curious analogy to feudal future interests which had to take effect by way of succession or fail entirely, these valid future interests by way of interruption were regarded as destructible¹. This was put an end to, however, in 1620 by *Pells v. Brown*².

II. BY WAY OF SUCCESSION. Future interests taking effect, if at all, only by way of succession created in conveyances by way of use or devise were of course valid as at common law. They were given their feudal names with a few exceptions. Thus, instead of a plain reversion, there was a resulting use of reversion in cases of conveyances to uses, or a resulting use of reversion on partial use. Whatever future interests, however, were unobjectionable under the feudal system, because they were certain to take effect, if at all, by way of succession, were equally valid and unobjectionable when created by conveyances operating under the Statutes of Uses and Wills.

III. BY WAY OF SUCCESSION OR INTERRUPTION. The principal difficulty in regard to the validity of future interests after the Statutes of Uses and Wills arose in connexion with the contingent future interests which might take effect by way of succession or interruption, according as the event happened before, or at the time of, or after the termination of the preceding interest. When such interests were created by way of use or devise, the question arose, whether the feudal rules applicable to similar feudal interests should prevail. The moment it was clear that future interests by way of interruption were valid when created by conveyances to uses or by devise, it should have followed that contingent future interests, whether after a particular estate of freehold or a term for years, when created in that manner were valid and indestructible.

The law, however, did not develop in this way. Before it became settled that future interests by way of use or devise were indestructible, it had been held that the feudal rule which required a contingent future interest after a particular estate of freehold, which possibly could take effect by way of succession, to do so or fail entirely, applied to future interests by way of use or devise. Not, however, until almost a century after *Pells v. Brown* (decided in 1620) does the question seem to have arisen as to the validity of the future interest by way of use or devise after a term for years limited upon an event which might happen before, or at the time of, or after the termination of the preceding interest. Then the results

¹ Gray's Rule against Perpetuities, 1st and 2nd ed., ss. 142, 143.

² Cro. Jac. 590.

reached were not in harmony. In *Adams v. Savage* (1703)¹, it was held by Lord Holt and Justice Powell that the contingent future use after a term was void following the rule of the common law². In *Gore v. Gore* (1722), the Court of the King's Bench, headed at that time by Lord Hardwick, certified to the Chancery an opposite opinion where the interests were limited by way of devise. It is not believed that any sound distinction can be predicated upon the fact that the limitations in the former case were by way of use and in the latter by way of devise. Which view, then, is correct?

The writers in dealing with *Adams v. Savage* have constantly assumed that the only question was whether the contingent interest after the term was like a springing use or like a contingent remainder by way of use. Obviously it was precisely a springing use—that is, it was bound to take effect, if at all, by way of interruption, cutting short a resulting use of reversion. *Adams v. Savage* has, therefore, been universally condemned³.

The difficulty with this criticism is that the premise upon which it rests and which is assumed was not at all settled when *Adams v. Savage* was decided. In the latter part of the seventeenth century the vital question was, it is believed, not whether the future interest after the term was like a springing use or a contingent remainder by way of use. It went back of that. It was rather the larger question in the development of the law: Shall the common law rules restricting the validity of future interests prevail as a general principle, or shall the full logical effect of allowing springing and shifting interests by way of use and devise be extended so as practically to abrogate the common law rules? The contest up to this time between these two lines of development had resulted on the one hand in the retention of the common law doctrine regarding the validity of contingent remainders—viz. that they were destructible—and on the other in the establishing of the principle that springing and shifting uses and devises were valid and indestructible. This latter step had not, however, been at once achieved. It is true that springing and shifting uses and devises were allowed as valid very shortly after the Statutes of Uses and Wills⁴. But as if upon second thought to repudiate that result, such future interests were held to be destructible⁵, which was to give them but an impoverished kind of validity. It was not till

¹ 2 Ld. Raym. 854; 2 Salk. 679.

² See also in accord: *Goodright v. Cornish*, 1 Salk. 226; Fearn, C. R. 282.

³ Gray's Rule against Perpetuities, 1st and 2nd ed., ss. 59, 60; Challis, A Point in the Law of Executory Limitations, L. Q. R. i. 412; Sugden on Powers (8th ed.), pp. 35 et seq.

⁴ Gray's Rule against Perpetuities, 1st and 2nd ed., ss. 136-8.

⁵ Ibid. ss. 142, 143.

1620¹ that shifting interests by way of devise were held indestructible, and this was certainly regarded as the triumph of a great innovation². The writer does not know precisely when, but it may be assumed that some time later, and perhaps before *Adams v. Savage*³, it had become accepted that springing uses and devises were fully valid—that is, indestructible. It is perfectly clear, however, that up to the very time *Adams v. Savage* was decided these results were regarded by the common law judges as indefensible innovations. They were still regarded as the triumph of new ideas over the principles of the common law. In *Scatterwood v. Edge* (1699)⁴, Treby C. J. is reported to have said: 'These executory devises had not been long countenanced when the judges repented them; and if it were to be done again it would never prevail'; and Powell J. in the same case declared that the notion that an executory devise was not barred by a recovery 'went down with the judges like chopped hay.'

When, therefore, *Adams v. Savage* came up, Holt and Powell were face to face not with the dry technical question of whether the future interest after a term was like a springing interest or not, but whether all the common law rules regarding the validity of future interests were to give way to this new principle, or whether the innovation of indestructible executory uses and devises was to be confined strictly to the case which gradually had become established. It was the old contest in a new part of the field. Lord Hardwick in 1722 was against the continuance of the common law restrictions. He doubtless looked upon the continuance of the destructibility of contingent remainders as a relic which had become established and could not be got rid of⁵. Holt and Powell were as clearly on the other side. *Adams v. Savage* simply indicates that they were for retaining the rules of the common law and for treating the full validity of springing uses, if it existed, as an abominable innovation which never should have been permitted. This is the key to the short statement of Lord Holt that 'the remainder to the heirs of the body

¹ *Pells v. Brown*, Cro. Jac. 590 (5 Gray's Cases on Property, 163).

² Gray's Rule against Perpetuities, 2nd ed., s. 121 i.

³ Perhaps by 1664, when *Snow v. Cutler*, 1 Lev. 135, was decided the matter was still in doubt. There 'A., having the reversion of copyhold land after his wife's death, devised it to the heirs of his wife's body, if he or they should attain fourteen years. A. died without leaving issue by his wife. She married again and had a son who reached fourteen. She then died. The question was whether the son was entitled. The judges seem to have been in great doubt. Kelyng C. J. and Twisden J. thought the devise good. Wyndham and Morton JJ., *contra*' (Gray's Rule against Perpetuities, 2nd ed., s. 165).

⁴ 12 Mod. 278, 281, 287.

⁵ It is worth observing that as late as 1672-8 an effort was made to overthrow the rule that contingent remainders by way of use were destructible (*Weale v. Lower*, Poll. 65 (1672); *Southcott v. Stowell*, 1 Mod. 226, 237, 2 Mod. 207 (1678)). It failed, but the effort seems not to have ceased until after *Cardwaine v. Cardwaine*, 1 Eden 34 (1757-8).

of the tenant for years is a contingent remainder and void.' He did not mean literally a contingent remainder but a contingent interest after a term, which according to the common law was wholly void¹. The real criticism of Holt and Powell's position is that it was reactionary and that the subsequent development of the law has condemned the result as an impediment to necessary progress. But Holt and Powell were not more wrong in *Adams v. Savage* than was the court which decided, and subsequent courts which have continued to hold contingent remainders by way of use and devise destructible. The holding in both cases is the offspring of the same principle—that the common law rules as to the creation and validity of future interests were to be retained even when the future interest is created by use or devise, except in the precise instances where it had been settled to the contrary.

Furthermore, there was the appearance of a principle upon which Holt and Powell might have said the common law rule ought to apply in the case of a contingent interest after a term.

A freehold *in futuro* not preceded by any interest, a contingent freehold after a term, and a future freehold after a particular estate of freehold which might take effect by way of succession or interruption, were all originally void for the same reasons and principally because of a gap in the seisin. This objection was least serious in the last case, because there was in that instance a seisin in the holder of the particular estate of freehold and a chance that the future interest would so take effect that there would actually be no gap. When it became valid, provided it did take effect by way of succession, it was still, so far as it was said to be destructible, invalid because of the gap in the seisin. When there was no preceding interest whatsoever, the gap in the seisin was the most serious, and in this case the common law never attempted to hold the gift valid. When these future interests were limited by way of use or devise it would appear that the less the common law had done for the future interest, the more was accomplished by the Statutes of Uses and Wills. The more the common law did to make the future interest valid, the less the Statutes of Uses and Wills accomplished. Thus, where a gap in the seisin existed because there was no preceding interest at all, the future interest was wholly void at common law, but valid and indestructible by way of use or devise. Where

¹ 'In truth, to say that in *Adams v. Savage*, and *Rawley v. Holland*, the Court thought that the disputed limitation was a contingent remainder properly so called, and not a springing use, is the same thing as to say, that at the date when those cases were decided, the existence of springing uses was not recognized by the Courts; or at least, that it was not recognized so clearly, but that the Courts might get completely confused between the idea of a springing use and the idea of a contingent remainder. And something very like this conclusion seems to have been the opinion of Sanders (1 Sand. Uses, 147, 148).' Challis on a Point in the Law of Executory Limitations, L. Q. R. i. 423.

only the chance of a gap existed because the future interest was so limited after a particular estate of freehold that it might take effect by way of succession or interruption the common law recognized it as valid, provided it took effect by way of succession. It was then valid but destructible. Thus it remained when limited by way of use or devise. In short, where the logical effect of the gap in the seisin was overcome by the common law itself, the Statutes of Uses and Wills did not change the rule regarding the validity of the future interest. When the common law was unable to save the gift at all, its limitation by way of use or devise made it not only valid, but indestructible.

Consistently with this course of treatment what results were to be obtained where a contingent interest after a term was involved? It was familiar law that a non-contingent future interest after a term was valid where livery of seisin was made to the tenant for years¹. To this extent there was a perceptible relaxation of the principle, that a gap in the seisin would invalidate the future interest. There was a further relaxation where a future interest after a term subject to a condition precedent in fact was held valid provided it was bound to take effect, if at all, by way of succession. This was true not only where the condition precedent in fact was expressed as subsequent in form, but in one case at least, when it was expressed as in form precedent². These relaxations were, in their way, while they did not go so far, not unlike the rule which allows the contingent interest after a freehold to be valid if it took effect in fact by way of succession. There was, therefore, this ground for drawing a distinction between a freehold *in futuro* unpreceded by any interest at all, and one where it was preceded by a term for years. In the former, the future interest was wholly invalid at common law because of the certainty of a gap in the seisin. In the latter, the common law devised means by somewhat artificial reasoning for overcoming the objection that there would be a gap in the seisin. The reliance upon such a principle for continuing the common law or feudal restrictions on the creation of future interests was doubtless unprogressive, if not reactionary. But it is believed, it has not always been observed that the position of Holt and Powell, in *Adams v. Savage*, has as much in its favour as has here been indicated.

CONCLUSION. The principal objection to the usual classification of future interests is that it is not undertaken enough from the point of view of their validity, and that so far as it is, the discussion is a catalogue of cases, which have certain conventional or

¹ Lit. sec. 60.

² *Supra*, pp. 256, 257.

historical names that have to be explained. The endeavour here has been to meet these objections by attempting to describe mutually exclusive classes of future interests in terms of the characteristics which furnish the reason for their being held valid or invalid by the common law. It is believed that no one will quarrel with the object of this task. The question will be : Has it been accomplished? It is hoped that no departure from recognized results of the authorities has been indulged in. The whole question, then, is : Are the characteristics which have been selected for the description of the mutually exclusive classes of future interests the proper ones? Are they the 'essentials' or the 'accidentals'?

ALBERT MARTIN KALES.

(To be continued.)

THE YEAR BOOKS.

I.

THE Year Books are the Law Reports of the Middle Ages, written by lawyers for lawyers. From the reign of Edward I to the reign of Richard III they stretch in a series which is almost continuous. In the reigns of Henry VII and VIII they become more and more intermittent; and the last printed Year Book is of the Trinity term 27 Henry VIII. During the terms and years of these centuries they give us an account of the doings of the King's Courts which are either compiled by eye-witnesses or from the narratives of eye-witnesses. They are the precursors of those vast libraries of reports which accumulate wherever the common law, or any legal system which has come under its influence, is studied and applied. If we except the plea rolls they are the only first-hand account we possess of the legal doctrines laid down by the judges of the fourteenth and fifteenth centuries, who, building upon the foundations which had been laid by Glanvil and Bracton, constructed the unique fabric of the mediaeval common law. Because they are contemporary reports they are of the utmost value, not only to the legal historian, but also to the historian of any and every side of English life. Just as the common law is a peculiarly English possession, so these reports of the doings of the Courts which constructed this common law are a peculiarly English source of mediaeval history. No other nation has any historical material in any way like them. Yet, until well on into the last century, they existed only in black letter books, published in the seventeenth century, and printed in contracted law French so carelessly as to be in many instances unintelligible; and the greater part of them are still in this condition. No one had cared to study the manuscripts upon which these printed books were based; and the tale told by tradition as to their origin was accepted without question and without verification. For about the last forty years their unique historical importance has been gradually arousing some interest in them. The work done upon them by the late Mr. Horwood and by Mr. Pike for the Rolls Series, and, above all, the work done upon them by Professor Maitland for the Selden Society, has taught us much of their origin, of the language in which they are written, and of their meaning and importance in the history of England and

of English law. It is proposed in this paper to say something of the results which have been reached in ascertaining the position which the Year Books hold among the sources of English legal history, and to indicate the manner in which they illustrate certain aspects of the development of English law.

We shall consider (1) the manuscripts and printed editions of the Year Books, (2) the origin and characteristics of the Year Books, and (3) the Year Books and the development of English law.

(1) *The manuscripts and printed editions of the Year Books.*

Until the publication of some of the unpublished Year Books in the Rolls Series practically no attention at all had been paid to the MSS. of the Year Books. The legal profession and even the legal historians never went beyond the printed books, or the Abridgements which had been published in the sixteenth century. No doubt many of these MSS. are lost, superseded by the printed page¹. Like the works of the lawyers who lived before the age of Justinian they became useless and disappeared. But when in the last half of last century the work of editing the Year Books began again it appeared that many still survived.

Mr. Horwood, describing a large MS. in the Cambridge University library, from which he took the text of the Year Book 20 & 21 Edward I, tells us that, besides the reports of those years, 'there is a large body of cases illustrative of pleadings in various writs, and nearly forty consecutive folios (370-409) of cases which, from the names of the judges, must have occurred in or before 18 Edward I' (1290)². Fitzherbert also used for his Abridgements not only Bracton's Note Book, but also reports which came from 12 & 13 Edward I (1284-5), as well as a number of undated cases of the time of Edward I³. Professor Maitland says that there are numerous cases which come from a period before the dismissal of the judges in 1289; 'and,' he says, 'we may add that one of our manuscripts contains a few cases which, unless we are much mistaken, belong rather to the seventies than to the eighties of the thirteenth century: cases decided by men who were on the bench in Henry III's day, and who must have known Bracton⁴.' Some of these MSS. give very concise notes of cases. They are rather head notes than reports⁵. Altogether the number of MSS. con-

¹ See Y. B. 1, 2 Ed. II (S. S.), xxx, and 3 Ed. II (S. S.), xvi-xxi for a MS., described by Selden in his *Dissertatio ad Fletam*, which is now lost; and Y. B. 17, 18 Ed. III (R. S.), xix for a MS. used by Fitzherbert, which has also disappeared.

² Y. B. 20, 21 Ed. I (R. S.), xv.

⁴ *Ibid.* x.

³ Y. B. 2, 3 Ed. II (S. S.), ix, x.

⁵ *Ibid.* xiv.

taining reports of cases of the reign of Edward II and earlier which have come before Professor Maitland is thirteen¹; they all present striking differences from each other². 'We are tempted,' he says, 'to say that whereas an investigator of manuscript literature can generally assume that every codex has only one parent, the ordinary laws of procreation hold good among these legal volumes, and that each of them has had two parents—two if not more. We could not explain this intimacy, were it not that we have before us the work of men who live in close fellowship with each other³.' The number of MSS. which Mr. Pike has used is smaller; but here again the differences between the MSS. is very considerable, and no one MS. can be considered as pre-eminent⁴. The marginal notes which their owners have fixed to them show that they have been extensively used⁵.

Until we get a modern edition of the whole of the Year Books it is impossible to say much of the MSS. of later years. Perhaps these MSS. will tell us something of the mode in which the later reports were made, and the manner in which they were circulated among the members of the legal profession—matters about which we are still very ignorant. For the present we have only the old printed editions, in which the whole of the reign of Richard II and some of the years of Henry V and VI's reigns are omitted⁶; and the new printed editions of some of the years of the three Edwards, published in the Rolls Series and by the Selden Society. Of these printed editions, old and new, we must now say something.

It was not till seven or eight years after the introduction of printing into England that the Year Books began to get into print⁷; and it was only gradually and by degrees that some of the many existing MSS. attained to this dignity. From the end of the seventeenth century to the middle of the nineteenth century no new MSS. were printed.

Probably the earliest printer of Year Books was William de

¹ Y. B. 2, 3 Ed. II (S. S.), xiv.

² Y. B. 1, 2 Ed. II (S. S.), xc; 3 Ed. II (S. S.), xii, xxxii-xli.

³ Y. B. 3 Ed. II (S. S.), xli.

⁴ Y. B. 12, 13 Ed. III, xix; cp. 11, 12 Ed. III, x-xviii, 13, 14 Ed. III, xvii-xxi, xxiv, 17 Ed. III, xxx, xxxi.

⁵ 20, 21 Ed. I (R. S.), xviii; 13, 14 Ed. III (R. S.), xxv; 16 Ed. III, (R. S.), i, xxi. 'It is probable that in the multiplication of copies by hand, for the use of the profession, various remarks originally made in the margin became incorporated in the text . . . It is difficult to account otherwise for the occasional interpolation of a query, with the answer *Credo quod non*, and for various observations, complimentary or otherwise, or statements of law by particular persons.'

⁶ Hale, Hist. Comm. Law, 201, says that he saw the entire years and terms of Richard II's reign in MS.; there are a few cases in Fitzherbert, Jenkins, Kellway and Benloe; these have been collected by Bellewe, Reeves H. E. L. ii. 487, Cooper, Public Records, ii. 392, 393.

⁷ On this subject see Soule, Year-Book Bibliography, Harv. Law Rev. xiv. 557 seqq.

Machlinia (1481 or 1482). He is thought to have printed Y. B. 30-37 Henry VI, and possibly Y. B. 20 Henry VI. Pynson (1493-1528) was their earliest systematic publisher. Fifty editions certainly, and perhaps five more, bear his name. Sixteen others are also attributed to him. His editions published between 1510 and 1520 cover 40-50 Edward III, most of the years of Henry VI and Edward IV, and the almost contemporary years of 9 & 12 Henry VII and 14 Henry VIII. Rastell, Redman, Thomas Berthelet, William Myddelton, Henry Smyth, and William Powell were their chief publishers during the first half of the sixteenth century¹. They published them in separate years separately folioed and dated. At most two were bound together. The booksellers or the lawyers bound these parts together in chronological order².

In 1553 Richard Tottell began his publications of the Year Books. During the thirty-eight years of his activity he succeeded in driving out all his rivals. 'There are,' says Mr. Soule, 'about 225 known editions of separate years or groups of years which bear his imprint or can be surely attributed to his press.' Early in his publishing career Tottell began to publish the separate years in groups. Thus in 1553 he printed the years 1-14 Henry IV as one book; so, in 1555 he printed the years 1-21 Henry VII, in 1556 the years 40-50 Edward II, in 1562 the years 1-10 Edward III, and in 1563 the years of Henry V³.

From 1587 to 1638 onwards the Year Books were published in parts; and these parts are known as the quarto edition—though really they consisted of small folio volumes. The parts were published as follows:—

- I. 1587. The long report of the fifth year of Edward IV's reign known as the 'Longo Quinto.' This was republished in 1638.
- II. 1596. Years 1-10 of Edward III's reign.
- III. 1597. The Year Books of 1 Edward V, 1 & 2 Richard III, 1-21 Henry VII, and the years 12, 13, 14, 18, 19, 26, 27 of Henry VIII.
- IV. 1599. Years 1-22 of Edward IV.
- V. 1600. Years 40-50 of Edward III, known as 'Quadragesms.'

¹ Soule, 563, 564.

² Soule, 561.

³ *Ibid.*, 564, 565. At p. 562 Mr. Soule says, 'It would seem that while the printers issued separate years and even supplied separate sheets to complete imperfect years, the booksellers and lawyers bound together after 1550, and probably even before that time, these separate pamphlets in chronological order, by reigns, with very much the same arrangement followed in the 1679 edition. But there was no uniformity of editions or imprints—every owner making his own combinations as he happened to get hold of different editions of the several years.'

- VI. 1601. Years 21-39 of Henry VI, omitting years 23-26 and 29.
- VII. 1605. Years 1-14 of Henry IV, and years 1, 2, 5, 7, 8, 9 of Henry V.
- VIII. 1606. The *Liber Assisarum*, i.e. a selection of cases taken from all years of Edward III's reign, and chronologically arranged. They are reported more concisely than the cases in the other collections; but at greater length than the cases in the Abridgements.
- IX. 1609. Years 1-20 of Henry VI, omitting years 5, 6, 13, 15, 16, 17.
- X. 1619. Years 17-39 of Edward III, omitting years 19, 20, 31-37.

Thus it is only in the first part of this so-called 'Quarto' edition that the original plan of publication in separate years survives.

Between 1638 and 1679 there was a cessation in the publication of the Year Books. They grew so scarce that in 1678 a complete collection was said to have been sold for £40¹. In 1679 there appeared the standard edition of the Year Books. It consists of eleven parts, the first only of which is new. The first part purports to be the Year Books of Edward I and II's reign, 'selonq les ancient Manuscripts ore remanent en les Maines de Sir Jehan Maynard Chevalier Serjeant de la ley.' It consists of Memoranda in Scaccario only of 1-29 Edward I, and Year Books of 1-19 Edward II. The other ten parts are substantially a reprint of the quarto edition arranged chronologically. The edition is in large folio. Two sides of the leaf of the older edition are contained on one page—a letter B in the margin marking the reverse of the sheet.

This edition therefore for the most part simply reprints those of the Year Books which had been already collected by the industry of the law publishers of the end of the sixteenth and the beginning of the seventeenth centuries. Neither the older editions nor the later show any signs of careful editing. In some cases, where two reports of the same case were found in different MSS., 'the second report is dissociated from the first, and either made to appear as a report of a different case, or else labelled as a *residuum* or continuation².' It is true that Tottell takes credit to himself for having done something in the way of correction³; and there are a few signs that in some cases more than one MS. has been con-

¹ Soule, 565.

² Pike, *The Manuscripts of the Year Books*, *The Green Bag*, xii, 534.

³ See passages from Tottell's editions of *Magna Carta*, and the *Quadragesms* cited by Soule, 563, 564, 568.

sulted¹. The edition of 1679 also claims to be corrected and amended; but in the opinion of those most competent to judge this claim is not justified. Professor Maitland has collected crushing evidence of the carelessness with which it has been printed². He shows that the MS. which Maynard lent, and the table of matters which he furnished, have been so printed that it is almost impossible to make sense of the greater part of the cases. 'Of mere, sheer nonsense those old black letter books are but too full³.' And at the present day the books which served lawyers 'steeped in the old learning of real actions' will not serve us, because 'we have not earned the right to guess what a mediaeval law report ought to say⁴.' Probably Maynard, whose life covered nearly the whole of the seventeenth century⁵, was the last who had thus earned the right to guess what the report ought to have said. The other ten parts of the standard edition are not perhaps so bad as the first part. The printer had a printed text before him and not merely a MS.; but even so, Mr. Pike says that the earlier editions are preferable to the later editions. The truth is that the same causes which caused the Register of Writs to become an obsolete book caused the Year Books to become obsolete reports. A large, perhaps the largest, part of the cases reported turned upon the management of a system of procedure which had practically come, with the disuse of many of the older writs, to belong to the past; and the language in which these cases were reported gradually grew more and more unlike that which the lawyers used. What was valuable in the Year Books had passed into the printed Abridgements. For the new law there were modern reports written in modern style.

From 1679 to 1863 nothing was done for the Year Books. The Select Committee on Public Records reported in 1800 that the series of Year Books should be completed by publishing those hitherto unpublished, and by reprinting from more correct copies those which were already in print⁶. This recommendation was not followed till 1863, when the series of unpublished Year Books of Edward I's reign and one year of Edward III's reign were edited for the Rolls Series by Mr. Horwood between the years 1863 and 1883. In 1885 Mr. Pike took up Mr. Horwood's work upon the Year Books of Edward III's reign. He was the first to begin the practice of collating the Year Books with the plea roll—the formal record of the case—and he thereby has shown us, 'who have not earned the

¹ Soule, 568.² Y. B. 1, 2 Ed. II (S. S.), xxi-xxviii.³ Ibid. xxi.⁴ Ibid. xxviii; to the same effect Mr. Pike, *The Green Bag*, xii. 535.⁵ Born 1602, died 1690.⁶ Cooper, *Public Records*, ii. 390, 391.

right to guess,' the way to verify¹. 'The process,' says Mr. Pike, 'of comparing a report with a record serves a double purpose. On the one hand it gives an authority to the text which would otherwise be wanting; it furnishes a means of deciding between conflicting MSS., and it affords a key to the correct translation of doubtful passages. On the other hand it supplies a ready mode of extracting, from a very valuable but extremely bulky and much neglected class of records, precisely that kind of information which is of the highest value and of the greatest interest. The Year Books are, in fact, to those who know how to use them, the most perfect guides to almost all that is important in the rolls².' It has been truly said that this step 'will hereafter be regarded as an important advance in the study of English history³.' Professor Maitland has followed Mr. Pike's lead in the edition of the Year Books of Edward II's reign which the Selden Society is publishing under his editorship. The excellence of the editing, the introductions and the notes will, if the series continue, go far to justify Professor Maitland's assertion that 'our formulary system as it stood and worked in the fourteenth century might be known so thoroughly that a modern lawyer who had studied it might give sound advice, even upon points of practice, to a hypothetical client⁴.' But to understand the full force of this saying we must pass to our second section—the origin and characteristics of the Year Books.

(2) *The origin and characteristics of the Year Books.*

Till quite recent years it was believed that the Year Books, at all events the Year Books from Edward III's reign down to Henry VII's reign, were compiled by official reporters paid by the Crown. This belief, which was shared by Coke⁵, Bacon⁶, and Blackstone⁷, ultimately rests upon some words used by Plowden in the preface to his reports. 'As I have been credibly informed,' he says, 'there

¹ Mr. Pike, *Harv. Law Rev.* vii. 266, says: 'The report was intended for the use of the legal profession . . . It was designed to show general principles of law, pleading or practice . . . The record, on the other hand, was drawn up for the purpose of preserving an exact account of the proceedings in the particular case *in perpetuum rei memoriam*, but only in the form allowed by the court. The report contains not only the reasons eventually accepted, but often the reasons or arguments which preceded each, and the reasons or arguments for which other pleadings were disallowed.'

² Y. B. 13, 14 Ed. III (R. S.), xvi, xvii; the idea seems to have been anticipated by Blackstone, see *Comm.* i. 71.

³ Y. B. 1, 2 Ed. II (S. S.), xxxi.

⁴ *Co. Rep.* iii, Pref.

⁵ *Ibid.* xvii.

⁶ *Works*, v. 86; in 1617 Bacon persuaded James I 'to revive the ancient custom' by appointing two reporters, 'to attende our Courts at Westminster,' at a salary of £100 a year, *Rymer, Foedera*, xvii. 27, 28.

⁷ *Comm.* i. 71, 72. Blackstone adds or invents the information that the reports were made by the prothonotaries.

were anciently four reporters of cases in our law who were chosen and appointed for that purpose, and had a yearly stipend from the King for their trouble therein ; which persons used to confer together at the making and collecting of a report, and their report being made and settled by so many, and by men of such approved learning, carried great credit with it.' It is clear that Plowden's statement rested merely upon report ; and the statements of later authorities are merely amplifications of his words.

Sir Frederick Pollock has suggested to me that Plowden's words do not necessarily refer to the Year Books at all. He thinks that they may refer simply to legends of good old days which never had any historical existence. Plowden is not, as Sir Frederick Pollock suggests, writing history : he is simply finding a rhetorical excuse for his shyness in publishing his own reports. If, in fact, any regular system of reporting by official reporters had been in force in the latest period of the Year Books he might well have known men who had personal knowledge of it ; and surely both his praise of its merit and his regret for its discontinuance would have been more definite. Sir Frederick Pollock, therefore, inclines to the view that the tale of the official origin of the Year Books is pure fiction. Additional probability is lent to this view by the following passage which occurs later in Plowden's preface :—

' And (in my humble Apprehension) these Reports [i. e. his own] excell any former Book of Reports in Point of Credit and Authority, for other Reports generally consist of the sudden sayings of the Judges upon Motions of the Serjeants and Counsellors at the Bar, whereas all the Cases here reported are upon Points of Law tried and debated upon Demurrers or special Verdicts, Copies whereof were delivered to the Judge, who studied and considered them, and for the most part argued in them, and after great and mature Deliberation gave Judgment thereupon, so that (in my opinion) these Reports carry with them the greatest Credit and Assurance.'

The reports to which Plowden considers his own to be superior cannot well be the same as those of the four men ; for he evidently considered his own to be inferior to them. On the other hand these reports which he considered to be inferior to his own are very probably the Year Books. They answer to his description of these inferior reports ; and they are in fact inferior to his own reports in exactly the points which he notes. If this suggestion be true the whole foundation for the belief in the official origin of the Year Books is destroyed. But however this may be, the three most recent editors of Year Books, Mr. Horwood¹, Mr. Pike²,

¹ Y. B. 30, 31 Ed. I (R. S.), xxiii, xxiv.

² Y. B. 14, 15 Ed. III (R. S.), xv ; 18 Ed. III, lxxx, lxxxi.

and Professor Maitland¹, are inclined, for the following reasons, to think that there is very little ground for the traditional belief—that it is certainly not true of the earliest Year Books, and probably not true of any. (1) We do not find any official record of the appointment of such reporters, nor are payments to them anywhere enrolled. (2) If the reports were made by royal officials we should expect to find official copies preserved for the use of the Court; but, says Professor Maitland, ‘so far as we are aware our manuscript Year Books always come to us from private hands².’ (3) As we have seen, the MSS. are so markedly different from one another that it is difficult to suppose that they spring from one official original³. (4) We shall see that the varied and picturesque nature of their contents forcibly suggest that they owe their origin to the enterprise of private members of the legal profession. Even the judges come in for their share of criticism; and in one early MS. there are notes of conversations between the writer and his friends or pupils⁴. We naturally think of those associations of students living together in hostels from which sprang the Inns of Court. (5) Further probability is given to this view by the fact that ‘we see a most remarkable contempt for the non-scientific detail of litigation: especially for proper names. These very often are so violently perverted that we seem to have before us much rather the work of a man who jotted down mere initials in court, and afterwards tried to expand them, than the work of an official who had the faithful plea rolls under his eye⁵.’ The divergent versions of the same case which the manuscripts present to us make it probable that their authors were men writing for themselves, who not only simplified facts, but also expanded arguments, and even invented both facts and arguments⁶. It is useful perhaps to remember that Plowden—one of the earliest of our modern reporters—called his reports commentaries. (6) At the end of Edward I’s reign there was no up-to-date textbook extant embodying the results of Edward I’s legislation. The only ways in which the student or the practitioner could learn modern law was by attending court, taking or borrowing notes, and discussion. For these reasons the weight of evidence is all against the old belief

¹ Y. B. 1, 2 Ed. II (S. S.), xi-xiv.

² Ibid. xii. Mr. Pike, *The Green Bag*, xii. 535, says, ‘No Year Books or copies of them have been found among the records of any of the courts. Some of the manuscripts are still in private hands; and those which are in public libraries can usually be traced to a particular donor or vendor.’
³ Above, p. 268.

⁴ Y. B. 2, 3 Ed. II (S. S.), xv, xvi.

⁵ Y. B. 1, 2 Ed. II (S. S.), xiii.

⁶ Y. B. 3 Ed. II (S. S.), lxxii-xciii for specimens of the reporter’s work compared with the record. A good instance of divergent reports will be found in Y. B. 3 Ed. II (S. S.), cases 21 A & B, pp. 186-8. Perhaps a little polish was expected; R. Farewell and J. Dyer tell us, in their dedication of Dyer’s reports to the students of the law, that the Chief Justice ‘wanted time and leisure to polish and beautify the said cases with more large arguments which he had a full purpose to have done.’

in the official origin of the Year Books. The earliest of them, Professor Maitland thinks, are 'students' notebooks¹.

In course of time the system of reporting gradually developed to meet the obvious needs of a legal profession engaged in administering a system of law, the principles of which depended almost entirely upon the practice of the Court. Just as books of precedents of writs and pleadings were necessary in order that the lawyer might present his case in proper form to the Court, so reports of decided cases were necessary if he was to know the principles which the Court would apply to decide the case. Indeed it is probable that it was only gradually that these books of precedents were differentiated from the law report². The book of precedents occasionally borrows from the Year Book³; and the Year Book sometimes gives us extracts from the pleadings, and thus serves the purpose of a book of precedents. The two things came, however, to be entirely distinct. Broadly speaking, the book of precedents deals with the formal and the procedural side of legal practice, while the Year Book deals chiefly with the application of the principles which underlie, not only the procedural rules, but also the rules of substantive law. Thus for an intelligent understanding, an intelligent application of the precedents, the reports in the Year Books were essential; and perhaps to many practitioners this consideration was a greater incentive to the study of the Year Books than the fact that it was only through them that a knowledge of the principles of the law could be attained. 'The spirit of the earliest Year Books,' says Professor Maitland, 'will hardly be caught unless we perceive that instruction for pleaders rather than the authoritative fixation of points of substantive law was the primary object of the reporters⁴.' But though the needs of the pleader may have been the paramount consideration in the minds of the earliest reporters, though such needs always continued to be an important consideration, it had been clear, since the days of Bracton, that without a knowledge of the doings of the Courts there could be no knowledge of English law. His treatise could not have been written if he had not had access to such information through the records which he had retained for a period⁵. But records were valuable things. By a lucky chance perhaps a lawyer might get access to a few of them⁶; but neither the mere apprentice, nor

¹ Y. B. 3 Ed. II (S. S.), xii.

² Y. B. 2, 3 Ed. II (S. S.), xiv; 3 Ed. II (S. S.), xiv.

³ *Novae Narrationes*, ff. 71-73 b; and see an extract from the *Brevia Placitata* cited Y. B. 2, 3 Ed. II (S. S.), xiv, n. 1.

⁴ Y. B. 1, 2 Ed. II (S. S.), xiv.

⁵ Bracton's *Note Book*, i. 25.

⁶ Professor Maitland (Y. B. 3 Ed. II (S. S.), xxi) says that one of the MSS. of Edward II's Y. BB. contains many records with a precise reference to the roll; Mr. Pike says that one MS. of the Y. BB. (Add. MS., no. 16560, in the British

even the serjeant, could be sure of getting the constant access to a series of such documents which would be necessary if they were to be used for purposes of instruction or as aids to practice. Moreover much pleading took place, and much argument thereon, which never appeared on the roll; and this was often as interesting to lawyers as the matters which appeared there¹. The legal profession was obliged to supply its own peculiar wants for itself; and thus the report of the doings of the Court made by lawyers for lawyers arose.

We cannot give the exact date when to some lawyer 'the happy thought'² first came of noting down the proceedings of the Court. The earliest printed Year Book in the Rolls Series is of the year 1292; but there are, as we have seen, earlier manuscripts³. Their writers, Professor Maitland thinks, are persons who are noting down the latest points for the use of themselves or their friends. They give no dates. Often they do not arrange their matter chronologically. Rather they distribute it under suitable heads after the manner of the writers of the later printed Abridgements. Thus, 'it is only by degrees that the oldest law reports become "Year Books," and even when the purely chronological scheme has obtained the mastery, we may see that for a while the men who write the manuscripts or have the manuscripts written for them are by no means very careful about assigning the cases to the proper years and terms⁴.' In later times the 'chronological scheme' does obtain the mastery. No doubt as the years went on reporting became a more regular pursuit. Still it was an open pursuit⁵. The Books of Assizes are reports in a style very different from that of the other Year Books of Edward III's reign. They are more concise than the Year Books usually are, giving rather the gist of the argument and the decision than a report of the actual proceedings. The Longo Quinto represents a more elaborate effort of reporting than had yet been seen. Often it seems to be more impersonal, and to give the gist of several reports rather than the actual account of the eye-witness. No doubt, too, the reporters became more skilful, more professional as time went on; they allowed themselves fewer scattered notes, fewer personal details. The report of the case is the main thing; and the report grows fuller. Perhaps it may be allowable to conjecture

Museum) for the first 120 folios contains copies of records; the rest of the 323 folios of which the MS. consists is taken up by reports, Y. B. 11, 12 Ed. III (R. S.), xv; sometimes what look like copies of records appear in the Y. BB., e.g. 11, 12 Ed. III (R. S.), 210, 13, 14 Ed. III, 306, 17 Ed. III, 324, Longo Quinto, pp. 20, 97, 98, 4 Ed. IV, Mich. pl. 25—a precedent of a recognizance; perhaps there was sometimes an attempt to combine the two sources of information.

¹ Above, p. 272, n. 1; cp. Y. B. 3 Ed. II (S. S.), lxix, lxx.

² Y. B. 1, 2 Ed. II (S. S.), xv.

³ Y. B. 2, 3 Ed. II (S. S.), xi; and cp. Y. B. 30, 31 Ed. I (R. S.), l.

⁴ Y. B. 14, 15 Ed. III (R. S.), xv.

⁵ Above, p. 267.

that, with the growing organization of the legal profession, there grew up some sort of organized system of reporting. With the more frequent citation of cases in court, and the greater authority attached to them, the need for reports grew more pressing. We really have no positive evidence at all as to the conditions under which the Year Book was published to the profession. No doubt, as in later times, there was extensive borrowing, and hasty copying of borrowed materials as and when they could be got¹. It is, however, difficult to suppose that a profession so well organized as that of the law did not devise or encourage some sort of informal organization for the production of reports. It is perhaps more than a coincidence that the serjeant's chief practice was in the Common Bench, and that the greater number of cases reported in the Year Books are common pleas. If there was some sort of organization for the production of reports, and if the legal profession exercised some control over it, we can easily see how the tale of their official origin arose. Such a tale would be the more readily believed by an age which had had time to forget the conditions which had prevailed before the introduction of printing. We sometimes speak of 'the Law Reports' as official; but the historian of our age will search the national accounts in vain for information as to the sums paid to the reporters.

A reliance on cases was, as we have said, as old as Bracton; and we can see from the early Year Books that a considered decision was regarded as laying down a general rule for the future. 'The judgment to be given by you,' said Herle in argument in 1304, 'will be hereafter an authority in every *quare non admisit* in England².' This does not of course mean that all the cases to be found in the lawyer's note books were regarded as authoritative³. Still cases are cited even in the early Year Books⁴; and in Edward III's reign we see a more frequent citation of and reliance upon cases.

¹ Y. B. 20, 21 Ed. I (R. S.), xviii, it is said that the MS. was clearly written from dictation, and that the scribe did not understand what he was writing; see Y. B. 13, 14 Ed. III (R. S.), xxi for an account of a MS. in which Y. BB. of Ed. II have got in among Y. BB. of Ed. III; and cp. Plowden's Rep. Pref. for the manner in which his reports were borrowed, and so incorrectly copied that he resolved to publish them himself.

² Y. B. 32, 33 Ed. I (R. S.), 32.

³ Y. B. 3 Ed. II (S. S.), x, 'A little acquaintance with the manuscripts that we have been transcribing would be enough to show that the justices could not have treated them in the way in which a modern judge can treat a modern law report. These manuscripts differ in every conceivable way. Every citation would begin a new dispute.'

⁴ Y. B. 20, 21 Ed. I (R. S.), 358 (not followed), 438 (distinguished); 21, 22 Ed. I (R. S.), 280, 340 (authenticity questioned), 242, 406; 30, 31 Ed. I (R. S.) 178; 32, 33 Ed. I (R. S.), 28, 146, 300; 33-35 Ed. I (R. S.), 24; 3 Ed. II (S. S.), 34, 60, 199. Sometimes the citation of cases by the judges takes the form of reminiscences, cp. Y. B. 16 Ed. III (R. S.), ii. 6, 'When you and I were apprentices,' said Shars-hulle, 'and Sir W. de Herle and Sir J. Stonore were serjeants, you saw Sir J. come to the bar,' &c.

In Henry VI and Edward IV's reigns, if we make allowance for the differences between the manuscripts and the printed book, and the differences between the Year Book and the modern report, we see cases cited and distinguished much in the same way as they are cited and distinguished in modern times. This would seem to show that the later Year Books are something very much more than students' notebooks. Just as the voluntary associations of students for the purposes of legal education won their way to the position of the Honourable Societies of the Inns of Court, so these students' notebooks became those Reports which Burke called the sure foundation of English law, and the sure hold of the lives and property of all Englishmen.

The introduction of printing directly affected the accustomed modes of publishing the reports. Men would no longer pay large sums to obtain a MS. or to get the power to copy it, when they could buy a printed report, or an abridgement of the reports. A severe shock was therefore given to the production of the Year Books upon the old lines; and the severity of the shock was aggravated by the fact that the same extensive changes in law and practice which were diminishing the importance of the Register of Writs were rendering many of the old cases obsolete. Material changes in the law assisted the mechanical change in the mode of production. The Year Books, as we have seen, ceased to appear in Henry VIII's reign. Perhaps some sanguine men considered that there were reports enough¹. But it soon became apparent that the professors and practitioners of a growing system of law, developed by the means of decided cases, could not dispense with reports. Dyer² and Plowden begin the long list of modern reports.

For many years to come the printed Year Books were absolutely necessary to all students of the law; and the printed Abridgements of the Year Books written by Statham, Fitzherbert, and Broke were useful indices to the Year Books themselves, and gradually became the only authorities for the reigns and years which did not get into print³. Just as the Year Books are the best indices to the records, so the Abridgements are our only index and guide to the Year Books.

We must now turn to the characteristics of the Year Books.

There are many mediaeval records of various kinds which record contemporary events. There are no other mediaeval records except

¹ Co. Rep. iii, Pref.

² There are a few cases in Dyer from the 4th, 6th, 19th, and 24th years of Henry VIII. His reports therefore just overlap the latest Year Books. The style of the later Y. BB. is very similar to the style in which these earlier cases in Dyer are reported.

³ Y. B. 13, 14 Ed. III (R. S.).

the Year Books which photograph the actual words, and actions, and idiosyncrasies of the actors as they were bringing these events to pass. When we read the official record we think of a machine, which automatically eliminates all the human dramatic element, and describes events and results in one impersonal, accurate, stereotyped form of words. When we read the Year Book we think of a human reporter, mainly interested it is true in law, but, for all that, keenly alive to the exciting incidents of the trial which is proceeding before his eyes—to judicial wit, and criticism, and temper, to the shifts and turns of counsel, to the skilful move or the bungling omission, even to the repartee and the exclamations which the heat of a hardly contested fight evoke. Though therefore the Year Books are valuable because they tell us much of the development of law, they are unique because they picture for us days in court in successive terms and years through these two centuries. Because they do this faithfully, not neglecting that human element which to-day is and to-morrow is not, they supply just that information which is omitted by those who record with mechanical correctness merely the serious business done. We see not only the things done; we see also the men at work doing them, the way these men did them, and how they came to be done in that particular way. It is for this reason that the Year Books are valuable documents not only to the historian of English law, but also to the historian of any part of English life. They create for us the personal element, the human atmosphere, which makes the things recorded in the impersonal record live again before our eyes.

There is a dramatic scene in Parliament in Edward I's reign, related by Beresford C. J. in a style very different from that of any formal record:—

'In the time of the late King Edward a writ issued from the Chancery to the Sheriff of Northumberland to summon Isabel Countess of Albemarle to be at the next Parliament to answer the King "touching what should be objected against her." The lady came to the Parliament, and the King himself took his seat in the Parliament. And then she was arraigned by a Justice of full thirty articles. The lady, by her serjeant, prayed judgment of the writ, since the writ mentioned no certain article, and she was arraigned of divers articles. And there were two Justices ready to uphold the writ. Then said Sir Ralph Hengham to one of them: "Would you make such a judgment here as you made at the gaol delivery at C. when a receiver was hanged, and the principal [criminal] was afterwards acquitted before you yourself?" And to the other Justice he said: "A man outlawed was hanged before you at N., and afterwards the King by his great grace granted that man's heritage to his heir because such judgments were not according to the law of the land." And then Hengham said: "The law wills

that no one be taken by surprise in the King's Court. But, if you had your way, this lady would answer in court for what she has not been warned to answer by writ. Therefore she shall be warned by writ of the articles of which she is to answer, and this is the law of the land." Then arose the King, who was very wise, and said: "I have nothing to do with your disputations, but, God's blood! you shall give me a good writ before you arise hence¹."

The following dialogue between Roubury J. and the assise illustrates forcibly the relations between Judge and Jury:

'*Roubury*.—How do you say that he was next heir? *The Assise*.—For the reason that he was son and begotten of the same father and mother, and that his father on his deathbed acknowledged him to be his son and heir. *Roubury*.—You shall tell us in another way how he was next heir, or you shall remain shut up without eating or drinking until to-morrow morning. And then the Assise said that he was born before the solemnization of the marriage, but after the betrothal².'

The reasonableness of the borough customs is not always apparent to the royal Judges. In answer to a plea of Parning, that the usage of Hereford was that a man could sell his land when he could measure an ell and count up to twelve pence, Schardelowe J. said, 'the usage is contrary to law, for one person is twenty years old before he knows how to measure an ell, and another knows how when he is seven years old³.' We get a glimpse at the actual working of the common field system in the following answer to a plea which set up common as a defence to an action of trespass:—

'Whereas they have said that this field should lie fallow every third year, and has always done so, Sir, we tell you that that field has always by the custom of the vill, and by the agreement of those therein, been sown in such manner as they chose to agree upon, sometimes for three years, sometimes for one year; and we tell you that it was agreed by all the tenants of the vill who had land in the field whereof we have complained, that the field should be sown⁴.'

We see, too, the tax collectors at work setting upon each vill a definite quota of the tax granted by Parliament; 'and afterwards each man was apportioned by his neighbours according to the goods and chattels which he had in the same vill⁵.' We see an allusion to that uncertainty in the measures of land, and the causes for that uncertainty, which makes so much of our earlier history obscure⁶.

¹ Y. B. 3 Ed. II (S. S.), 196; something of the Countess of Albemarle will be found in Red Book of the Exchequer (R. S.), iii, cccxii-cccxiv, 1014-1023.

² Y. B. 21, 22 Ed. I (R. S.), 272.

³ Y. B. 12, 13 Ed. III (R. S.), 236. ['Parning' was really Parvyng; see Mr. Pike's introduction to Y. B. 18 Ed. III.]

⁴ Y. B. 11, 12 Ed. III (R. S.), 370; cp. 3 Ed. II (S. S.), 112, 113.

⁵ Y. B. 17, 18 Ed. III (R. S.), 618.

⁶ Y. B. 35 Hy. VI, Mich. pl. 33, p. 29. Prisot C. J. says, 'Un carue de terre est grand en aucun pais que n'est en auter pais; et uncore, mesque un soit moins

The difficulties of travel which made it necessary for the process of the Court to be slow if it was to be fair are forcibly illustrated by many cases¹. We see the Judges like other people anxious for the beginning of the vacation. Catesby was arguing for a certain form of plea. Danby told him that he must plead specially, and that he had better plead in this way at once 'because we can't stay to argue matters of law at the very end of the term'².

The Year Books are thus valuable in many ways to historians, other than the legal historian, for the glimpses which they give us of many sides of English life. But even from this more general point of view it is to the legal historian that they are chiefly valuable, because they contain a first-hand, and sometimes critical, account of the doings and sayings of the Court as they passed under the reporter's eye. As we have before hinted, it is this characteristic of the Year Books which is the strongest evidence against their official origin³. We shall here give one or two illustrations of the scenes in court thus described and of the reporter's doubts and criticisms thereon. For convenience we shall group them under the following heads:—Manners and Wit of the Bench and Bar; the relations of Bar and Bench; the reporter's notes.

The Manners and Wit of the Bench and Bar.

Both Judges and Counsel are fond of swearing, by God, by St. James, or by St. Nicholas. Even in that age, John of Mowbray's direction to the defendant, the Bishop of Chester, to 'go to the great devil,' is not easily surpassed⁴. The satisfaction of Counsel when the Judge had given a ruling in their favour sometimes found odd expression. Mutford had recourse to his Vulgate. 'Blessed is the womb that bare thee' he said to Methingham J. when he had given a ruling in his favour⁵. Their dissatisfaction, too, is clearly marked:

'Toudeby.—Sir, we do not think that this deed ought to bind us, inasmuch as it was executed out of England. *Howard J.*—Answer

que un auter, chescun per luy est un carue, car un plough puit arrer plus terre en l'an en aucun pais que en auter pais.'

¹ Y. B. 33-35 Ed. I (R. S.), 120; 38 Hy. VI, Pasch. pl. 13.

² Longo Quinto, p. 54, 'Car ne purromus arguer matters en ley per cause del fine del terme.'

³ See Y. B. 21 Ed. IV, Mich. pl. 4, Genney J. dissented; the reporter hints that it was because he had just been raised to the bench and had argued the case at the bar—'la cause fuit come jeo croy pur ce qu'il fuit de counsel d'autre partie en meme le breve d'error quand il fuit Serjeant'; it is almost inconceivable that an official reporter should have thus imputed motives.

⁴ Y. B. 43 Ed. III, Pasch. pl. 43, cited Y. B. 30, 31 Ed. I (R. S.), xxxi.

⁵ Y. B. 20, 21 Ed. I (R. S.), 436; cp. 11, 12 Ed. III (R. S.), 312.

to the deed. *Toudeby*.—We are not bound to do so for the reason aforesaid. *Hengham C. J.*—You must answer to the deed; and if you deny it, then it is for the Court to see if it can try, &c. *Toudeby*.—Not so did we learn pleading¹.

The reporters had a keen eye for the pithy saying, the apposite anecdote, or a wrangle on the bench. 'You cannot deny,' said Howard J., 'that the tenements as well in one vill as in the other were holden by one and the same service; and you are seised of the tenements in one vill; will you then have the egg and the halfpenny too?' In a case of Edward III's reign, Willoughby J. was laying down the law. 'That is not law now,' said his brother Sharshulle. 'One more learned than you are adjudged it,' retorted Willoughby². The clergy of the province of Canterbury, argued Counsel, do not meddle with the clergy of the province of York, and neither is bound by a grant made by the other—'Because the Jews have no dealings with the Samaritans'³.

The relations of Bar and Bench.

The relation between the Serjeants and the Judges was not quite the same as the relation between the Bar and Bench in modern times. The Judges and the Serjeants together formed the highest branch of the legal profession—the order of the coif; so that to become a Serjeant was a more solemn and important step than to become a Judge. Traces of this old fellowship long survived in the common life of the Serjeants and Judges in the Serjeants Inns, in the rule that all Judges must be chosen from the Serjeants, and in the practice of addressing a Serjeant from the Bench by the title of 'brother.' The Year Books testify to the fact that the Serjeants and Judges are brothers of one order. The Court asks them for their opinion⁴. Resolutions are come to with their consent⁵. Their dissent or approval is recorded; and the reporter regards their opinions with more respect sometimes than the dicta of the Judges. 'Judgment is pending,' says the reporter, 'but all the countours say the writ was invalid'⁶. A demandant was non-suited, 'because all the Serjeants agreed that the writ could not be supported in this case'⁷. 'And this was the opinion of *Herle* and,

¹ Y. B. 32, 33 Ed. I (R. S.), 72.

² Ibid. 400.

³ Y. B. 14, 15 Ed. III (R. S.), 114; cp. 11, 12 Ed. III (R. S.), 442.

⁴ Y. B. 21 Ed. IV, Mich. pl. 6 (p. 47).

⁵ Y. B. 2 Hy. VI, Mich. pl. 3. An apprentice had put a case to the court, and then, 'Martin l'un des justices mettra le cas a les Serjeants a le barre et demanda que semble a eux seroit fait en ce cas.'

⁶ See e.g. Y. B. 34 Hy. VI, Mich. pl. 13, 'Quod fuit concessum per omnes justitarios et per plures Serjeants al barre.'

⁷ 21, 22 Ed. I (R. S.), 218.

⁸ 30, 31 Ed. I (R. S.), 106.

for the greater part, of all the serjeants, except *Passeley*, who told *Hedon* boldly to stick to his point. And so [*Hedon*] did¹. After a dispute on the Bench it is noted that the common opinion is against the view of *Parning*². Even a dictum of the apprentices is noted³, and sometimes conversations out of court⁴. At the same time the intimacy of the relations between Bar and Bench did not prevent the Judges from speaking their minds very freely to the Bar. 'We forbid you on pain of suspension to speak further of that averment'; 'leave off your noise and deliver yourself from this account'; 'that is a sophistry and this is a place designed for truth'—are remarks attributed to *Hengham*⁵. 'Are not the tallies sealed with your seal? About what would you tender and make law? For shame!'; 'get to your business. You plead about one point, they about another, so that neither of you strikes the other'; 'these seven years I never was put to study a writ, so much as this; but there is nothing in what you say'—are remarks attributed to *Bereford*⁶. 'Shame to him who pleaded this plea,' said *Malore J.*⁷ 'This is not the first time we have heard a plea of this kind,' sarcastically remarked *Sharshulle J.*⁸ *Pulteney* had said, 'We do not see what will become of the first plea if this issue be entered.' 'It will go to the winds as does the greater part of that which you say,' brutally remarked the same Judge⁹. A somewhat neater score was made by one of Edward IV's Chancellors. The plaintiff has no remedy, argued Counsel, because he has made no deed; and if a man is so simple that he enfeoffs another on trust without a deed he has no remedy and has only himself to blame. Not so, said the Chancellor, he will have a remedy here in Chancery, for God protects the simple¹⁰.

The reporter's notes.

The reporters were quick to note a quick retort, a foolish argument or a bungling plea. 'My client is a poor man and knows no law,' argued *Toudeby*. 'It is because he knows no law that he has

¹ Y. B. 3 Ed. II (S. S.), 160.

² 14 Ed. III (R. S.), 214, 216 (see note 3, p. 280 above).

³ Y. B. 21, 22 Ed. I (R. S.), 446.

⁴ Y. B. 2, 3, Ed. II (S. S.), xv, xvi; 30, 31 Ed. I (R. S.), 234; 14 Hy. IV, Hil. pl. 37; 33 Hy. VI, Trin. pl. 26.

⁵ Y. B. 32, 33 Ed. I (R. S.), 446; 33-35 Ed. I (R. S.), 6, 20.

⁶ Y. B. 3 Ed. II (S. S.), 47, 169, 195.

⁷ Y. B. 33-35 Ed. I (R. S.), 348.

⁸ Y. B. 16 Ed. III (R. S.), ii, 446; cp. *ibid.* 480, 482.

⁹ Y. B. 17, 18 Ed. III (R. S.), 350.

¹⁰ Y. B. 8 Ed. IV, Pasch. pl. 11, 'Il avera [remedie] et issaint poies dire si jeo enfeoffe un home en trust etc., s'il ne voit faire ma volonte jeo n'avera remedy per vous, car il est ma folle d'enfeoffer tiel person que ne voit faire ma volonte etc.; mez il avera remedie en cest courte car *Deus est procurator fatuorum*'; for other scenes between judge and counsel cp. Y. BB. 11 Hy. IV, Trin. pl. 49, and 5 Hy. V, Hil. pl. 11.

retained you,' was Herle's reply¹. We hear of the laughter in court occasioned by a foolish answer²; and we sometimes get criticism of the rulings or manners of the Judges. A ruling is noted as 'marvellous'³. 'Your answer is double,' said Brumpton J., 'and cannot be received,' but, adds the reporter, 'he did not assign the reason'⁴. Hervey le Stanton gets nick-named Hervey le Hasty⁵. Thirning said to Counsel that he had spoken with his fellow Justices and that he (Counsel) must answer. Upon which Hull (another Counsel) remarked aside that he had never before seen that laid down for law, and, sympathetically added the reporter, 'I myself have seen the contrary adjudged by the same Judges'⁶. Mr. Justice Rickel had been a plaintiff together with some others in a plea of trespass. The writ was abated, 'with the assent of all the Justices except the plaintiff,' drily observes the reporter⁷. He notes, too, the smile with which Paston J. pointed what he considered to be a mildly humorous illustration⁸. Similarly we get extraneous facts noted which struck the reporter's fancy. He is reporting a case in the Exchequer Chamber, and notes that it was heard by the new Treasurer, about whom he gives us a few details⁹. He tells us that other arguments were used on another day 'when I was not present'¹⁰. Often his notes express his doubts or queries on points of law—and sometimes they are of a lengthy and argumentative kind¹¹. Such notes show us the court at work, and something of the minds of the lawyers. But the Year Books are not primarily collections of pithy sayings, and picturesque incidents. The teaching and the publishing of the law is their object. We must now say something of the light which they shed upon legal development during these centuries.

W. S. HOLDSWORTH.

(To be continued.)

¹ Y. B. 1, 2 Ed. II (S. S.), 64.

² Y. B. 33-35 Ed. I (R. S.), 326.

³ Y. B. 16 Ed. III (R. S.), 1, 242.

⁴ Y. B. 31, 32 Ed. I (R. S.), 192.

⁵ Y. B. 14 Hy. IV, Hil. pl. 37.

⁶ Y. B. 2, 3 Ed. II (S. S.), 200.

⁷ Y. B. 2 Hy. IV, Mich. pl. 48.

⁸ Y. B. 19 Hy. VI, Pasch. pl. 5, 'Mettons que si un home veut defouler votre femme, vous justifierez de luy battre en defence de votre tres cher compaignon, et subridebat.'

⁹ Y. B. 4 Ed. IV, Hil. pl. 3, 'En l'Exchequer Chambre devant touts les Justices le matiere fuit reherce que fuit perentre le Roy et Sir John Paston, et la fuit le novel Tresorer que fuit fait meme cel terme id est Sir Walter Blount que fuit Tresorer de Calice ii ou iii ans ore passes.'

¹⁰ e. g. Y. B. 21 Ed. IV, Mich. pl. 6 (p. 47), 'Ad alium diem plusiors des Serjeants argueront mes jeo ne fue a lour arguments.'

¹¹ e. g. Y. B. 12, 13 Ed. III (R. S.), 74; 17, 18 Ed. III (R. S.), 204; 38 Hy. VI, Pasch. pl. 9.

THE CONSEQUENCES OF A TRUSTEE'S FAILURE TO CONVERT AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

EVERY lawyer knows that, according to the rule in *Howe v. Earl of Dartmouth*¹, where a testator indicates an intention that the residue of his personal estate shall be enjoyed by persons in succession, it is the duty of the trustee in the absence of evidence of a contrary intention on the part of the testator to convert so much of the estate as is of a wasting or perishable nature, or consists of securities not authorized for the investment of trust funds, and so much of the estate as is of a reversionary or expectant nature, into authorized investments. It may be doubted, however, whether the consequences as between the beneficiaries of failure to apply the rule when it ought to be applied or, what comes to the same thing, to perform an express trust for conversion are well known, having regard to the confused statements which appear in the textbooks upon the subject.

The matter is of importance in adjusting accounts between tenant for life and remainderman, for it often happens that when property ought to be converted either under the rule or by the express terms of the trust instrument, it is found impossible to convert it within a year from the settlor's death. Sometimes, especially when conversion is expressly directed, this is foreseen and provided for by the testator, but often it is not. An examination of the authorities appears to show that the rights of the parties are then governed by a series of somewhat complicated rules according to the circumstances of the case. The following is believed to be a correct statement of these rules :—

RULE I.

In adjusting accounts between tenant for life and remainderman, the first rule is that *the tenant for life is entitled to the whole of the income produced by the property to be converted where the settlor indicates an intention to that effect*. In the form of express trust for conversion generally used by conveyancers, this intention is clearly expressed ; the following cases show that whenever there is a duty to convert,

¹ (1802) 7 Ves. 137, 6 R. R. 96; White & Tudor, Leading Cases in Equity, 7th ed., vol. i. 68.

the intention may be inferred from the terms of the will although not clearly expressed :—

Illustrations.

1. Testator gives his residuary personal estate, consisting partly of ships, to *A* for life, with remainder to her children. He directs his executors not to sell any of his ships for seven years from his death, unless the keeping them unsold should cause loss. *A* is entitled to the whole income to be derived from the ships while retained, *Green v. Britten* (1863) 1 De G. J. & S. 649.

2. Testator gives his estate upon trust for conversion, the proceeds to be invested and held in trust for his wife for life, remainder to his children. The will contains a power to postpone conversion and a direction that until conversion the rents, profits, and income are to be paid and applied in the same manner as the income of the trust estate. The testator's estate consists principally of a business carried on by him, which the executors carry on with a view to its sale as a going concern. The wife is entitled to the whole of the profits of the business, *In re Chancellor, Chancellor v. Brown* (1884) 26 Ch. D. 4.

3. Testator gives his residuary estate upon trust for conversion and investment of the proceeds on specified securities, with power to the trustees in their absolute discretion to retain any securities unconverted, and to stand possessed of 'the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and the income thereof' upon trust to pay the income to certain persons for life with remainder over. The estate includes redeemable American bonds. The tenants for life are entitled to the whole net income of those which are retained, *In re Thomas, Wood v. Thomas* [1891] 3 Ch. 482¹.

RULE II.

Sometimes however, although the settlor has foreseen that it will not be possible to convert the property immediately and has provided for this by giving the trustee power to postpone the conversion, he has furnished no indication of his intention as to the application of the income until conversion; sometimes the settlor has made no provision at all, but it is impossible to convert the property immediately without loss to the estate. In these cases the rule is that *a value must be put upon the property as at the death of the settlor, and the tenant for life is entitled to 3 per cent. interest on such value from the day of the settlor's death, and the residue of the*

¹ Compare *In re Sheldon, Nixon v. Sheldon* (1888) 39 Ch. D. 50.

income must be invested as capital¹. This rule was first formulated by Lord Eldon in the case of *Gibson v. Bott*¹, and its foundation is that, although there is no breach of trust in delaying to convert in such cases, the delay must not be allowed to prejudice anybody².

The rate of interest allowed was formerly 4 per cent. But in 1900, in a case in which the conversion of a reversionary interest was in question, the Court of Appeal allowed interest at 3 per cent. only, in view of the rate of interest which can now be obtained on securities upon which trustees may invest³, and it has since been held that the same rate must apply in a case within this rule⁴.

The tenant for life is of course entitled to the income produced by the invested interest⁵.

In referring to the case of *Gibson v. Bott*, Mr. Lewin says that although it does not appear from the report at what time the value was to be taken, according to recent cases it should have been ascertained at the expiration of one year from the testator's death⁶. The cases he cites are *Caldecott v. Caldecott*⁷, *Sutherland v. Cooke*⁸, *Re Llewellyn's Trust*⁹, and *Meyer v. Simonsen*⁹.

In *Caldecott v. Caldecott* the order of the Court certainly was that the tenant for life was entitled to so much of the dividends and interest of the unauthorized securities as would not exceed 4 per cent. on the sums ascertained to be the value thereof respectively at the end of one year after the testator's death¹⁰. But in that case the testator had given the residue of his estate to his executors *in trust to be by them from time to time as they should think fit turned into moneys*, and subject thereto to lay out and invest the same on trust for persons in succession, and Vice-Chancellor Knight Bruce said (1 Y. & C. C. C. p. 322) that he could not read these words as expressing more than the law would direct or imply without them. The case is in fact almost identical with *Brown v. Gellatly*¹¹ so far as the third class of securities in that case was concerned. It seems therefore to fall rather under Rule III below than this one.

¹ *Gibson v. Bott* (1802) 7 Ves. at p. 97, 6 R. R. 90; *Meyer v. Simonsen* (1852) 5 De G. & Sm. 723; *Re Llewellyn's Trust* (1861) 29 Beav. 171—in each of which there was no power to postpone conversion but it was impossible to convert without loss: *Brown v. Gellatly* (1867) L. R. 2 Ch. 751; *Cooper v. Laroche* (1869) 38 L. J. Ch. 591; *Furley v. Hyder* (1873) 42 L. J. Ch. 626—in each of which there was a power to postpone.

² See per Lord Eldon in *Gibson v. Bott*, *supra*, and per Lord Cairns in *Brown v. Gellatly*, *supra*.

³ *Rowls v. Bebb* [1900] 2 Ch. 107.

⁴ *In re Woods, Gabellini v. Woods* [1904] 2 Ch. 4.

⁵ *Meyer v. Simonsen*, *supra*; *In re Woods, Gabellini v. Woods*, *supra*.

⁶ Lewin, *Trusts*, 10th ed., 328. This is followed by Snell, *Equity*, 12th ed., 181.

⁷ (1842) 1 Y. & C. C. C. 312, 737, 57 R. R. 345.

⁸ (1845) 1 Coll. 503, 65 R. R. 166.

⁹ *Supra*.

¹⁰ See the form of order 1 Y. & C. C. C. at p. 738.

¹¹ In *Brown v. Gellatly*, *supra*, the testator gave his property to his trustees in trust to realize the same 'when and in such manner as they may see fit,' and Rule III was applied by Lord Cairns to the unauthorized securities. See below.

Sutherland v. Cooke was likewise a case within Rule III below; there was no power to postpone conversion, and the property which ought to have been converted might easily have been sold, but by an innocent mistake the whole income had been paid to the tenant for life. It was argued that she was entitled only to such interest as would have been payable had the property been sold at the end of one year after the testator's death, and the produce invested in Bank 3 per cent. annuities. As will be shown presently this was correct. Vice-Chancellor Knight Bruce, however, thought there was no positive rule on the subject, and, as he had done in *Caldecott v. Caldecott*, allowed 4 per cent. on the value of the property at the end of a year after the testator's death.

In *Re Llewellyn's Trust* there were two classes of property to be converted—one falling under this rule because it could not be realized immediately, and one under Rule III below. Sir John Romilly said in the course of his judgment, 'the period for ascertaining the value of the property will be twelve months after the death of the testator,' but he appears to have been referring to the latter class. There was no question of ascertaining the value of the former class, which consisted of unpaid balances of purchase money carrying interest at 5 per cent.

In *Meyer v. Simonsen* it is not stated when the value should be taken for a similar reason; the fund in question consisted of a debt of £12,000 payable by eight yearly instalments of £1,500 with interest at 5 per cent.

The cases cited by Mr. Lewin therefore do not support his statement, and it is directly contrary to the decision of Lord Cairns in *Brown v. Gellatly*, who says in the course of his judgment, 'it seems to me that the case falls exactly within the third division pointed out by Sir James Parker in the case of *Meyer v. Simonsen*, and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value. And this was the order actually made in the case as appears from the minutes of it given at the foot of the judgment. The statement in Lewin consequently appears to be erroneous. It is the result of a confusion of Rules II and III.

The above rule was applied by Mr. Justice Kekewich in *Re Eaton*¹, but it is submitted that the decision was incorrect. The securities to be converted in that case were unauthorized, and there was no power to postpone conversion, nor was it suggested that they could not be converted without loss. The case therefore fell within the decision in *Dimes v. Scott* or Rule III below.

¹ [1894] 70 L. T. 761.

The following cases illustrate the application of this second rule:—

Illustrations.

1. Testator gives his residuary estate upon trust to convert and hold the proceeds in trust to pay the income to *A* for life with remainder over. The residuary estate includes leasehold property which cannot be sold owing to defects in the title. A value must be set upon this, and *A* is entitled to interest at [3] per cent. upon that value from the death of the testator, *Gibson v. Bott* (1802) 7 Ves. 89, 6 R. R. 87.

2. Testator gives the residue of his estate upon trust to pay the income and profits to his widow for life with a gift over. The will contains no direction as to the conversion of his estate, which includes £12,000 invested in a partnership. Under the provisions of the partnership deed the £12,000 is repayable by instalments of £1,500 with interest at 5 per cent. on the unpaid balances. The tenant for life is entitled to [3] per cent. on the sum from time to time remaining due; the difference between the 3 per cent. and the 5 per cent. must be invested, and the dividends thereon paid to the tenant for life, *Meyer v. Simonsen* (1852) 5 De G. & Sm. 723¹.

3. *A* by will gives his residuary estate to *B* for life with remainder over. The residuary estate includes ships. *A* directs his executors to realize his estate 'when and in such manner as they may see fit,' and gives them power to sail his ships for the benefit of his estate till they can be satisfactorily sold. *B* is entitled as from *A*'s death only to [3] per cent. per annum on the value of the ships at the date of *A*'s death, and the residue of the profits produced by the ships must be invested, *Brown v. Gellatly* (1867) L. R. 2 Ch. 751².

RULE III.

In any other cases than those falling within the foregoing rules, except that of reversionary interests which need to be dealt with separately, the rule is that *when property which ought to be converted is not converted, the tenant for life is entitled as from the settlor's death to the interest on so much $2\frac{1}{2}$ per cent. consols as the amount that would have been realized by a conversion at the end of a year after the settlor's death would have purchased.*

¹ *Re Llewellyn's Trust* (1861) 29 Beav. 171 is similar.

² *Cooper v. Laroche* (1869) 38 L. J. Ch. 591; *Furley v. Hyder* (1873) 42 L. J. Ch. 626; *Wentworth v. Wentworth* [1900] A. C. 163, are similar.

This rule was laid down by Lord Lyndhurst in the case of *Dimes v. Scott*¹. It is sometimes confused with the preceding rule. Mr. Lewin, for example, gives this rule, but does not clearly distinguish Rule II above from it². Mr. Underhill³ gives only one rule instead of two. But that there are two distinct rules appears clearly from Lord Cairns' judgment in the case of *Brown v. Gellatly*⁴. The residuary estate in that case comprised three classes of property—(1) certain ships belonging to the deceased which the testator had given his executors full power to sail for the benefit of his estate until they could be satisfactorily sold; (2) investments in securities which the testator had authorized his executors to retain; (3) other investments not within the power of investment contained in the will. Lord Cairns said:

'I think that with regard to the ships the testator put them simply in the position of property which was to be converted cautiously, and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which when converted was to be invested, and when invested to be enjoyed as the residue of his estate. In that state of things it seems to me that the case falls exactly within the third division pointed out by Sir James Parker in the case of *Meyer v. Simonsen*, and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested and become part of the estate. Then, secondly, as to the authorized securities... the tenant for life is in my opinion entitled to the specific income of the securities just as if they had been 3 per cent. consols. Then comes the third question in the case, the securities not ranging themselves under any of those mentioned in the last clause of the will.... I think the proper order to make is that which was made in *Dimes v. Scott* followed by Vice-Chancellor Wigram in the case of *Taylor v. Clark*, namely, to treat the tenant for life as entitled during the year after the testator's death⁵ to the dividends upon so much 3 per cent. stock as would have been produced by the conversion and investment of the property at the end of the year.'

And there is reason in the distinction between the two rules. When the trustees have a discretion to postpone conversion or the property cannot be converted without loss, the trustees are not guilty of a breach of trust in refraining from converting it. When

¹ (1828) 4 Russ. 195, 28 R. R. 46.

² Lewin, *Trusts*, 10th ed., 327.

³ *Trusts and Trustees*, 6th ed., 187, Art. 37 (1) b.

⁴ (1867) L. R. 2 Ch. 751; the distinction between the rules is also drawn by Sir J. Parker in *Meyer v. Simonsen*, *supra*, and by Sir J. Romilly in *Re Llewellyn's Trust*, *supra*. The two rules are also given in *White & Tudor*, L. C. Eq., 7th ed., vol. i, 86, 87; *Brett*, L. C. Eq., 4th ed., 155, 157; and *Gover*, *Capital and Income*, 99, 100.

⁵ In the minutes of the order given at p. 760 of the report the words 'as from the 6th March 1862 the day of the testator's death' are substituted for these, and they appear to be more correct.

the property could be sold, and there is no power to postpone the sale, the trustees are guilty—at least technically—of a breach of trust in not converting it within the year; and though they may not be morally blameworthy, the rights of the beneficiaries must be regulated as if they had performed their duty and sold the property not later than one year after the testator's death. Whether this difference is sufficient to make it worth while to have two rules where one might be made to do may be open to question, but as the authorities stand the two rules clearly exist.

The following cases are illustrations of the application of this rule:—

Illustrations.

1. Testator gives the residue of his personal estate to trustees upon trust to convert and invest it in government or real securities and to stand possessed thereof in trust for A for life with remainders over. The estate includes £2,000 invested in a loan redeemable in ten years with interest meantime at 10 per cent. The trustees must account as if the £2,000 had been converted and invested in consols at the end of a year from the testator's death, and any higher rate of interest than the consols produce paid to A by them must be refunded, *Dimes v. Scott* (1828) 4 Russ. 195, 28 R. R. 46¹.

2. Testator gives the residue of his estate on trusts for persons in succession. He gives his executors full power to realize the same 'when and in such manner as they may see fit'² and to invest at their discretion or allow to remain as at present invested all his funds in government and other specified securities. The estate includes stocks, shares, and securities not coming under any of these descriptions and not being proper investments for trust moneys. The tenants for life are entitled as from the day of the testator's death to the interest of so much Bank 3 per cent. annuities³ as the amount that would have been realized by a conversion thereof at the end of the year after the death of the testator would have purchased at the end of the year, *Brown v. Gellatly* (1867) L. R. 2 Ch. 751.

RULE IV.

The above rules are not applicable when the property which ought to be converted consists of a reversionary interest or other

¹ *Taylor v. Clark* (1841) 1 Hare, 161, and *Morgan v. Morgan* (1851) 14 Beav. 72, are similar.

² These words do not amount to a power to retain the residue in its existing state of investment. See per Knight Bruce V.-C. in *Caldecott v. Caldecott* (1842) 1 Y. & C. C. C. at p. 322, 57 R. R. 349.

³ The investment would now be 2½ per cent. consols. See *In re Game, Game v. Young* [1897] 1 Ch. 881, a similar case.

property which is not got in until more than a year after the testator's death. In the case of such property the rule is that *when the property is received it is apportionable between tenant for life and remainderman by ascertaining the sum which put out at 3 per cent. per annum on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would with the accumulations of interest have produced at the date of receipt the amount actually received; and the sum so ascertained ought to be treated as capital and the residue as income*¹.

Here also the rate of interest formerly allowed was 4 per cent., but in view of the rate of interest now obtainable on trustees' securities the Court now only allows 3 per cent.²

The authorities seem to show that it does not matter in this class of cases whether the trustees delay getting in the reversionary or expectant property in the exercise of a power to postpone conversion, or because it was for the benefit of the estate to postpone it, or simply because they did not appreciate that it was their duty to get it in. In each case the tenant for life is entitled to have the income he has lost made good to him. There was a power to postpone in *Beavan v. Beavan*¹ and in *In re Chesterfield's Trusts*¹, but there was apparently no such power in *In re Goodenough*¹. There was a power to postpone in *Rowlls v. Bebb*², but the Court held it had not been exercised. In each case the rule was applied.

WALTER G. HART.

¹ *In re Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643 following *Beavan v. Beavan* (1869) *ibid.* 649 n. See also *In re Goodenough* [1895] 2 Ch. 537.

² *Rowlls v. Bebb* [1900] 2 Ch. 107.

THE BASIS OF CASE-LAW.

I.

CASE-LAW, as it exists to-day, consists of a vast fabric of juridical reasoning built up principle upon principle, and rule upon rule, of which part only—perhaps we might say a small part only—finds its ultimate basis either in custom, whether general or local, or in rules of Roman or Canon law incorporated into the English system. The object of the present article is to endeavour to penetrate below the mass of judicial decisions which have no such starting-point, and discover on what it is in truth based. In his recent brilliant work on *Law and Opinion in England in the Nineteenth Century*, Mr. A. V. Dicey, in treating of what he terms ‘judicial legislation,’ speaks in one or two places as though it entirely consisted of ‘interpretation’ in the sense of which the Editor of this REVIEW uses that word, when he says, in a passage quoted by Mr. Dicey:—‘It may with equal verbal correctness be affirmed in one sense, and denied in another, that interpretation (whether performed by judges or text readers) makes new law¹.’ Sir Frederick Pollock, however, defines ‘interpretation’ in the book referred to as ‘the scientific process of applying legal rules in detail. It necessarily assumes the existence and authority of the rules which it explains and applies².’ Mr. Dicey seems to take the view that judge-made law wholly consists of such interpretation still more clearly in another passage of his book, where he says that the existence of such law arises from the general acceptance of two ideas, of which one is that a Court or a Judge must follow precedents, and the other is—

‘That a Judge or Court when deciding any case must act, not as an arbitrator, but strictly as a judge; or that it is a judge’s business to determine not what may be fair between *A* and *X* in a given case, but what, according to some definite principle of law, are the respective rights of *A* and *X*. Hence it follows that every Court in deciding a case must tacitly or expressly apply to it some definite principle³.’

¹ *The First Book of Jurisprudence*, 2nd ed., p. 236; see Dicey, *ibid.*, p. 359, n. 2 (y).

² Pollock, *ibid.*, p. 229.

³ *Law and Opinion in England*, pp. 481–2. Again he says:—‘Judge-made law is subject to certain limitations. It cannot openly declare a new principle of law: it

But what, I would ask, happens when the case which has arisen between *A* and *X* is altogether one of first impression; when, that is, there is not in existence any principle of law which can be applied in any way to provide the proper *ratio decidendi* as between *A* and *X*, other than that very thing which Mr. Dicey says it is not the judge's business to determine, namely, what, under the circumstances of the case, 'may be fair between *A* and *X*'? It is undeniable that judges must find a solution, with or without authority, for every case which comes before them; and it is cases *primae impressionis*, where no authority direct or indirect can be found to guide the Court, that it is desired to deal with in this article. All that portion of case-law which does not rest either upon customs of the realm or upon local customs, or upon rules of foreign origin incorporated into our law, can only be based upon just such decisions. In fact we have to do here with those rules of judicial law which Mr. Austin refers to 'as established by judges *ex proprio arbitrio*, i.e. according to their own opinions of what ought to be law, whether the standard be utility or any other¹.'

Such cases might naturally be expected to grow fewer as time goes on and precedents accumulate, but, as will be presently shown, they not infrequently arise even to-day; and Mr. Dicey's words above quoted can, it is submitted, only be accepted so far as they are concerned, if we understand his expression 'principle of law' to include such elementary considerations as justice, common sense, and public convenience. These are the ultimate principles of case-law.

In *Millar v. Taylor*² where the question was whether there is copyright at common law apart from statute, Willes J. utters the notable dictum (at p. 2312), that 'private justice, moral fitness, and public convenience, when applied to a new subject, make common law without a precedent; much more when received and approved by usage.' And in the same case Lord Mansfield says (at p. 2398):—

'From what source is the common law drawn, which is admitted to be so clear, in respect of the copy before publication? From this argument—because it is *just*, that an author should reap the pecuniary profits of his own ingenuity and labour. It is *just*, that another should not use his name, without his consent. It is *fit*,

must always take the form of a deduction from some legal principle whereof the validity is admitted, or of some application or interpretation of some statutory enactment': p. 486.

¹ Austin's Lectures, 5th ed., p. 634. Such decisions are of that kind which Sir M. Hale says, in his History of the Common Law, 'seem to have no other guide but the common reason of the thing, unless the same point has been formally decided': 6th ed. by Runnington, p. 91.

² (1769) 4 Burr. 2303.

that he should judge when to publish, or whether he ever will publish. . . . It is agreeable to the principles of right and wrong, the fitness of things, convenience and policy, and therefore to the common law, to protect the copy before publication.'

These dicta may well be taken as the text for this article; or rather, stating the purport of them in a more general way, it may be put thus:—Where there is no governing precedent, direct or indirect, justice and other principles of right and wrong, the fitness of things, convenience, and policy, make case-law. They are referred to with approval by Erle J. in the subsequent case of *Jefferys v. Boosey*¹. On the other hand in the case of *Millar v. Taylor* itself, Yates J. says (at p. 2359), that to support the copyright of authors as a moral and equitable right 'has indeed a captivating sound; it strikes the passions with a winning address: but it . . . begs the very question in dispute. For the injustice it suggests depends upon the extent and duration of the author's property; as it is the violation of that property that must alone constitute the injury'; and in *Jefferys v. Boosey*, Pollock C. B. (at p. 935), referring to Willes J.'s words above quoted, says:—

'He appears to think that, because upon general principles, he has satisfied himself of the justice and propriety of an author possessing such a right (i.e. copyright after publication), therefore, by the common law it exists.'

He then quotes the above words of Willes J. and says:—

'I entirely agree with the spirit of this passage, so far as it regards the repressing of what is a public evil, and preventing what would become a general mischief; but I think there is a wide difference between protecting the community against a new source of danger, and creating a new right. I think the common law is quite competent to pronounce anything to be illegal which is manifestly against public good; but I think the common law cannot create new rights, and limit and define them, because in the opinion of those who administer the common law such rights ought to exist, according to their notions of what is just, right, and proper.'

And in the same case, in the House of Lords, Lord Brougham (at p. 968) says that he entirely concurs with the objection taken by Pollock C. B. to the argument of Willes J.

Nevertheless it is proposed to show by reference to quite recent cases, that the dicta above referred to of Willes J. and Lord Mansfield in *Millar v. Taylor* were not only true when spoken, but

¹ (1854) 4 H. L. C. 815, per Erle J. at pp. 868, 876, in which latter place he says that in *Millar v. Taylor*, Lord Mansfield 'does the service of tracing the law upon the question to its source in the just and useful'; and adds that some of Lord Mansfield's successors 'appear to me to have turned away from that source of the law to which he habitually resorted with endless benefit to his country.'

are true to-day; and that if it is the fact, as it is stated in a recent well-known work, that 'a commonsense or reasonable view of the circumstances of the case would be considered a rather audacious ground of judicial decision by most lawyers, more especially, perhaps, in England¹, this is only because the accumulation of precedents, direct or indirect, has become so great, and the original foundations of case-law are buried so deep beneath the superincumbent mass, that such lawyers have lost sight of them. Even to-day, however, cases not infrequently arise where there is no authority to guide or control the Court, and it will be found that the basis of decision in such cases is nothing else than right and wrong, common sense, or public convenience, balanced against one another, and harmonized to the best of the Court's ability. And so in the most interesting introduction to his *Law of Trade Unions*, Sir W. Erle says (pp. 49-51):—

'If the origin of the principles of the common law is to be traced beyond their practical existence, they seem to originate from conscience, i.e. from the same power which has made the majority of all free men of all ages and languages to have a perception of that which they feel to be just; and which they admire for itself, and assume to be useful till the contrary be proved.'

To illustrate by decided cases the operation of these great basic principles as creative of case-law, and the way in which the judges in constructing and formulating the law upon them, balance them one against another, should make an interesting chapter in a practical study of the case-law system.

We may, then, conveniently consider the matter under the following heads:—

1. Justice, humanity, and other moral obligations as a primary source of case-law.

2. Common sense, and the reason of the thing, as a primary source of case-law.

3. Public convenience and other practical considerations as a primary source of case-law.

1. *Justice, humanity, and other moral obligations as a primary source of case-law.*

We cannot open this branch of the discussion better, perhaps, than by the words of Lord Kenyon in *Pasley v. Freeman*²:—

'All laws stand on the best and broadest basis which go to

¹ Clark's *Practical Jurisprudence*, a Comment on Austin, at pp. 244-5. Professor Clark adds: 'I conceive, however, that a "reasonable view of the circumstances of the case" has been at the bottom of most of the decisions upon which our rules of English equity were founded: nor do I see how it can ever cease to be the one ground of decision, until every possible case can be provided for by a previous rule.'

² (1789) 3 T. R. 51 at p. 63, 1 R. R. 634, 648.

enforce moral and social duties. Though, indeed, it is not every moral and social duty, the neglect of which is the ground of an action. . . . There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the non-performance of which the jurisprudence of this country has made the subject of a civil action.

A good example of the Court, in the absence of direct or indirect authority, founding a legal duty on a moral obligation, is *Queen v. Instan*¹. There the prisoner, a woman of full age, and having no means of her own, lived alone with, and was maintained by the deceased, her aunt, a woman of seventy-three. For the last ten days of her life the deceased suffered from a disease which rendered her perfectly helpless. During this time the prisoner lived in the house, and took in the food supplied by the tradesmen, but gave none of it to the deceased, nor did she procure for her any nursing or medical attendance, nor inform any one of the condition of the deceased, which no one but she knew. The death of the latter was substantially accelerated by want of food, nursing, and medical attendance. The Queen's Bench Division unanimously decided that a duty was imposed on the prisoner under the circumstances to supply the deceased with sufficient food to maintain life; and she was convicted of manslaughter. Lord Coleridge C. J. says (at p. 453):—

'It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement². There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was necessary to sustain life of the food which she from time to time took in. . . . There was, therefore, a common law duty imposed upon the prisoner which she did not discharge. . . . There is no case directly in point; but it would be a slur upon, and a discredit to the administration of justice in this country if there were any doubt as to the legal principle, or as to the present case being within it. The prisoner was under a moral obligation to the deceased from which arose a legal duty towards her.'

It will be seen that the judgment does not state explicitly what is the 'legal principle' referred to, and on which the decision proceeds. It seems clearly to be nothing more or less than this:—that where there is a clear moral obligation, in the opinion of the

¹ [1893] 1 Q. B. 450.

² Clearly not accurate. In the Common Law a man may, in certain cases, be liable as an insurer without having undertaken to be liable or omitted any possible diligence.—Ed.

Court proper to be enforced by law, there the Court, even in the absence of all authority, ought to find a legal duty to exist corresponding to the moral obligation. But that this will not always be the case is shown in the somewhat analogous case of *Reg. v. Shepherd*¹, where, although the moral obligation seems quite clear, the Court did not translate it into a legal obligation. There, a mother (the prisoner) omitted to procure a midwife for her daughter, a girl of eighteen years of age, who was taken in labour in the house of the mother and her second husband, the girl's step-father, in consequence of which neglect the girl died. Erle C. J., delivering a judgment in which all the other judges concurred, said (at p. 155):—

'We must take it that, if she (the prisoner) had used ordinary care, she would have procured the attendance of a midwife. . . . Yet the prisoner cannot be criminally responsible for not asking for that aid which, perhaps, might have been given without compensation. . . . These facts do not seem to me to fall within the principle of any of the cases which have been cited. . . . Here the girl was beyond the age of childhood, and was entirely emancipated. . . . I cannot find any authority for saying that that was such a breach of duty as renders the prisoner, in the event which ensued, liable to the consequences of manslaughter.'

Something may, perhaps, turn on the fact that *Reg. v. Shepherd* was decided in 1862, and *Queen v. Instan* thirty years later.

The power of the Court,² however, in the absence of all authority, to declare a right to exist, or to not exist, on general considerations of *aequum et bonum* is illustrated by the very recent case of *Bradford Corporation v. Ferrand*². There a new question came up for decision, namely, whether, if underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have any right of action for the abstraction of the underground water, or to put the matter conversely, whether the owner of the land through which the underground water flows, has a right to extract it to the prejudice of the lower riparian proprietors. No English reported case had yet dealt with the right to water flowing underground in a defined but *unknown* channel. Farwell J., however, points out that the foundation of the rights of riparian proprietors to water flowing in a defined and *known* channel, or on the surface of the earth, which are now well settled, is stated throughout the cases to be *jus naturae*; and that there is a principle in English law which is akin to, if

¹ (1862) Le. & Ca. 147.

² [1902] 2 Ch. 655.

not derived from, the *jus naturale* of Roman law, namely, the principle of *aequum et bonum*: and that the conception of *aequum et bonum* and the rights flowing therefrom which are included in *jus naturale*, underlie a great part of English common law, although it is not usual to find the 'law of nature' or 'natural law' referred to in so many words in English cases; and, in the result, coming to the conclusion that it was not right or reasonable that the lower owner should have any right to prevent obstruction of a subterranean stream flowing in a defined, but unknown course, Farwell J. made a declaration that there is no right in underground water where the course of its channel is unknown.

In the course of his judgment Farwell J. refers to other cases than those relating to watercourses, where the basis of the law laid down is nothing else than *aequum et bonum*. Thus he says, at p. 662:—

'Lord Mansfield in *Moses v. Macfarlan* (1760) 2 Burr. 1005, 1012, explains the common count for money "had and received" as a kind of equitable action to recover back money which "ought not in justice to be kept. . . . It lies only for money which, *ex aequo et bono*, the defendants ought to refund. . . . In one word, the gist of this kind of action is, that the defendant . . . is obliged by the ties of natural justice and equity to refund the money." So Baron Martin, in *Freeman v. Jeffries* (1869) L. R., 4 Ex. 189, 199, explains actions *quasi ex contractu* thus:—"But for a long time implied contracts have been admitted into the law, where, a transaction having taken place between parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that one party ought in justice and fair dealing to pay a sum of money to the others¹." So the law merchant, says Buller J., in *Master v. Miller* (1791) 4 T. R. 320, 342, is "a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith"; and see an article on "the Law of Nature" by Sir Frederick Pollock in the Journal of Comparative Legislation for 1901.'

We have referred above to humanity as a primary source of case-law. This is well illustrated by *Bird v. Holbrook*², where the question arose, apparently for the first time, whether the owner of land who, for the protection of his property, had set spring guns in his garden without giving any notice of his having done so, was liable to the plaintiff who climbed over the wall of the garden in pursuit of a stray fowl, and was shot. In the previous case of *Hott v. Wilkes*³ it had been decided that a trespasser on land who had

¹ As to implications being raised by the law where justice requires them, see article on judge-made law in L. Q. R. xx. 399.

² (1828) 4 Bing. 628, 29 R. R. 657.

³ (1820) 3 B. & Ald. 304, 22 R. R. 400.

notice before trespassing that there were spring guns set there, though not of the particular spots where they were placed, could not maintain an action against the owner of the land for injury sustained in consequence of his accidentally treading on the latent wire communicating with such a gun. In *Bird v. Holbrook*, however, the Court held in favour of the plaintiff, Best C. J. saying at p. 643¹:—

‘We want no authority in a case like the present. We put it upon the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion.’

So again in *Merry v. Ryves*²—a rather old case, but one which settled the law, as is recognized in the recent case of *In re Brown, Ingall v. Brown*³—the question came up before Lord Keeper Henley, whether one *in loco parentis* whose consent to a marriage was necessary, and who had once given his consent, could afterwards capriciously retract it. He decided in the negative on the sole ground that ‘it would be a most cruel thing to suffer young persons to contract and entertain affection, and then *ad libitum* withdraw the assent.’

In *Bird v. Holbrook* (4 Bing. at p. 641⁴), Best C. J. says:—

‘It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids that the law will not reach. If it were otherwise Christianity would not be, as it has always been held to be, part of the law of England.’

It is appropriate to our purpose to consider what measure of truth there is in the oft-repeated dictum that Christianity is part and parcel of the law of England. Lord Hale appears to have been the first to make this assertion in 1676 in the course of his judgment in *Rex v. Taylor*⁵. The dictum was merely obiter, the application being that to reproach the Christian religion is to speak in subversion of the law. The learned judge was dealing with the objection that specific words, such as Taylor had uttered, were punishable only in the Ecclesiastical Court. He held that they were cognizable also in the secular Court, because they were a danger to the State. As late, however, as 1867, we find Kelly C. B. stating that ‘there is abundant authority for saying that Christianity is part and parcel of the law of the land.’ That action was one of breach of contract to let rooms to the plaintiff, which the defendant

¹ 29 R. R. 669.

² [1904] 1 Ch. 120.

³ 1 Ventris, 293.

⁴ (1757) 1 Eden 1.

⁵ 29 R. R. 667.

⁶ *Cowan v. Milbourn*, L. R. 2 Ex. at p. 234.

sought to justify because he had subsequently discovered that they were intended to be used for lectures maintaining that the character of Christ is defective, and his teaching misleading, and the Bible no more inspired than any other book. Kelly C. B. at the place referred to says:—

‘There is abundant authority for saying that Christianity is part and parcel of the law of the land, and that therefore to support and maintain such a proposition with respect to our Saviour is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms.’

Martin B. and Bramwell B. concurred in the result. In the later case, however, of *Reg. v. Ramsey & Foote*¹, Lord Coleridge expresses his dissent from the above dicta of Kelly C. B. and points out that while, on principle, blasphemous libel is illegal, what constitutes blasphemous libel will differ with the progress of the times. He says that it may have been true at one time in a wider sense to say that Christianity was part of the law of the land than it is now, e.g. when Jews were under heavy disabilities for religion; but that to base a prosecution for blasphemous libel comprising a denial of the truth of Christianity, *simpliciter* and *per se*, on the ground that Christianity is part of the law of the land, in the sense that it was said by Lord Hale, would now be a mistake.

It is no doubt true that Christianity is the religion of the Church which is by law established in England; but on the other hand English law recognizes and protects the Jewish religion, and even allows Mohammedan places of worship to exist in Liverpool and elsewhere; and it seems impossible to attach any real meaning to the statement that Christianity is parcel of the law of England beyond this—that English morality is a Christian morality, and as such plays an important part in making English law what it is. It does not appear possible to attribute any more precise meaning than this to the dictum of Lord Hale².

It seems unnecessary to adduce further proof that justice, humanity, and morality are primary sources of case-law; and still less to labour the point that legal obligations are not coextensive with moral obligations. Two striking illustrations of the latter fact may, however, be briefly referred to. To take benefits under a will conferred by the testator expressly in confidence that one

¹ (1883) 48 L. T. N. S. 733 at p. 735.

² See *Encyclopædia of the Laws of England*, *sub voc.* Christianity: ‘It is a pleasant phrase to quote; but it has no precise meaning.’

will do certain things which he desires done, and yet to act otherwise, could, probably, seldom be justified from a moral point of view; and yet it is well established that such confidences will not be protected or enforced by the law, unless intended to be positive trusts¹. It is still more clear that to make representations of one's intentions with a view that another shall act upon them, and yet to wilfully decline to make them good to the detriment of that person, can seldom be agreeable to common morality and honesty. Nevertheless it is clear law that the mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to entitle the party to obtain any relief².

And as Courts will not always frame a legal obligation upon a moral obligation, so, also, they cannot allow moral obligations to override legal rights. Thus in *Turner v. Mason*³ the defendant had peremptorily dismissed the plaintiff, who was his domestic servant, because she had absented herself from his employment in order to visit her dying mother, in spite of his express refusal to give the desired leave. The Court decided against the plaintiff who brought her action for wrongful dismissal, Alderson B. saying (p. 117) that the circumstances alleged by the plaintiff 'amount only to moral duty, and do not show any legal right. We are to decide according to the legal obligations of parties. Where is a decision founded upon a mere moral obligation to stop? What degree of sickness, what nearness of relationship is to be sufficient? It is the safest way, therefore, to adhere to the legal obligations arising out of the contract between the parties.' So, too, in *Blackburn, Low & Co. v. Vigors*⁴, Lord Macnaghten says (p. 543):—'I apprehend that it is not the function of a Court of Justice to enforce and give effect to moral obligations which do not carry with them legal or equitable rights.'

When then, we may ask, do moral obligations carry with them legal or equitable rights? The only possible answer seems to be that, in the absence of statute or of some principle adopted from the civil or canon law, moral obligations carry with them legal or

¹ *In re Adams and The Kensington Vestry* (1884) 27 Ch. D. 394.

² *Per Cozens-Hardy J., In re Fickus, Farina v. Fickus* [1900] 1 Ch. at pp. 334-5. There is no general equitable doctrine of 'making representations good': L. Q. R. xxii. 8.

³ (1845) 14 M. & W. 112, 69 R. B. 670.

⁴ (1887) 12 App. Cas. 531. In this the Court refused to give to a moral obligation the indirect consequences which it would have had if it had also been a legal obligation: (effect on policy of marine insurance of non-disclosure by a former agent of the plaintiff, who had been superseded by the agent who actually obtained the policy in question).

equitable rights, only when judges, balancing considerations of justice and right with considerations of public convenience, practical expediency, and common sense, come to the conclusion that it is well to give them legal efficacy.

2. *Common sense, and the reason of the thing, as a primary source of case-law.*

It may be true, as Brett J. says in *Robinson v. Mollett*¹, 'that legal principles have almost always been the fundamental ethical rules of right and wrong,' but it seems to be going too far to say with Lord Esher M. R. in *Blackburn, Low & Co. v. Vigors*² that:— 'Every general proposition laid down by judges, as a principle of law, as distinguished from an enactment by statute, is the statement of some ethical principle of right and wrong applied to circumstances arising in real life.' For, in the first place, as will presently appear, in some instances public interest or practical convenience is allowed in case-law to override considerations of right and justice to particular individuals; and in other cases it can scarcely be said that any question of right and wrong arises; or else justice or other moral considerations are so evenly balanced between the parties as not to form a basis for decision. Such cases are those to which it is desired now to refer as having been decided on the ground of common sense and the reason of the thing, although in truth these are, perhaps, wide enough expressions to cover all the grounds of judge-made law with which this article is concerned³. *Sundolf v. Alford*⁴ seems a good example. Here, in the absence of any authority, the Court of Exchequer laid down the law, or in fact

¹ (1875) L. R. 7 H. L. 802 at p. 817.

² (1886) 17 Q. B. D. 553 at p. 558.

³ What is called deciding a case 'upon principle' sometimes means deciding a case, in the absence of all authority, direct or indirect, upon one or more of the general considerations with which this article deals; and sometimes it means deciding a case upon indirect authority and analogy, in the absence of direct authority. As examples of the first we may cite *Hambro v. Burnand* [1904] 2 K. B. 10, per Romer L. J. at p. 23; and *Burnley Equitable, &c. Society v. Casson* [1891] 1 Q. B. 75, per Hawkins J. pp. 77-8, where there seems to have been neither direct nor indirect authority; and of the second, *Wason v. Waller* (1868) L. R. 4 Q. B. 73, per Cockburn C. J. at pp. 87 et seq.; and *Munster v. Lamb* (1883) 2 Q. B. D. 588, per Brett M. R. at pp. 599-600. Of course Courts are much influenced in determining what is reasonable by prevailing practices, e. g. the practice of regarding mortgages of stocks and other securities of a fluctuating character as carrying with them a power of sale on failure to pay within a reasonable time: *Deverges v. Sandeman Clark & Co.* [1901] 1 Ch. 70; the practice of auctioneers receiving cheques in lieu of cash for deposits; *Farrer v. Lacy, Hartland & Co.* (1885) 31 Ch. D. 42: the practice of companies to pay a reasonable brokerage to secure subscriptions for shares; *Metropolitan Coal Consumers' Association v. Scrimgour* [1895] 2 Q. B. 604: the practice of purchasers of colonial or other inscribed stock not to attend personally at the bank to accept the transfers to them, although that course is recommended on the common form of stock receipt issued to purchasers; *Shepherd v. Harris* [1905] 2 Ch. 310, where a trustee was held not liable for the fraud of his co-trustee acting as broker by reason of such non-attendance on his part, though he would have discovered the fraud if he had so attended personally.

⁴ (1838) 3 M. & W. 248, 49 R. R. 593.

made the law, that an innkeeper cannot detain the person of his guest, or take off his clothes, to secure payment of his bill, for that, as Lord Abinger says (at p. 254):—‘If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has the right to detain him until the bill is paid, which may be for life. . . . The proposition is monstrous.’ With this the other judges concurred, Parke B. remarking (at p. 253) that were the law otherwise, then ‘if the innkeeper take the coat off the guest’s back, and that prove to be an insufficient pledge, he may go on and strip him naked, and that would apply either to a male or to a female. That is a consequence so utterly absurd, that it cannot be entertained for a moment.’

Here, too, it would seem proper to place certain cases where the expressions ‘natural right’ or ‘right by nature’ seem, at least to the writer, to be used by English judges, not so much with reference to the *jus naturale* of the Roman lawyers, as to conditions of physical nature, and the configuration of the soil, which suggests as reasonable and proper, if not necessary, the recognition of certain rights or liabilities in adjoining proprietors. The law here can at any rate scarcely be said to be based on considerations of right and wrong in the moral sense. Thus with reference to the reciprocal right of adjoining owners to have each his soil supported by the soil of his neighbour, whether adjacent or below, so that any act done by one which destroys that support, whether done by him maliciously, or simply in the exercise of his own right to use his own property, is an actionable wrong, Fry J. says, in *Dalton v. Angus*¹:—‘There is no doubt on the authorities that, as the support of soil by soil is in fact a result of nature, so the right to such support is given by the law as *ex jure naturae*, and as a proprietary right.’ So per Selborne L. C. (S. C. at p. 792):—‘Support to that which is artificially imposed upon land cannot exist *ex jure naturae*, because the thing supported does not itself so exist’; per Thesiger L. J. (S. C., 4 Q. B. D. at pp. 167–9):—‘It is clear that the support of a building cannot be claimed as a natural right of property. Natural rights of property must be rights which attach to property in its primitive state, and cannot, without a contradiction in terms, be applied to an artificial subject matter like a house’; per Brett L. J. (S. C. at p. 191):—

‘Such rights must have been always in nature from the beginning. They are attributes of nature given for the common benefit of mankind. . . . The reason why the right is admitted in all those cases [sc. the right to lateral support of land, and to the use

¹ (1881) 6 App. Cas. 740 at p. 772.

of light and air as between adjacent land owners] is that without such a right the owner cannot enjoy his land, if he so pleases, in the condition in which it was given for the enjoyment of man by nature.'

And so again in *Sampson v. Hoddinott*¹, Cresswell J. says:—'It appears to us that all persons having land on the margin of a flowing stream have, by nature, certain rights to use the water of the stream, whether they exercise those rights or not.' So likewise in *Smith v. Kenrick*² Cresswell J., delivering the judgment of the Court of Common Pleas, lays down the *ratio decidendi* thus:—

'Treating the question as a new one, not governed by the authority of any decided case—for all those referred to are distinguishable—it would seem to be the natural right of each of the owners of two adjoining coal-mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party.'

And common sense and the reason of the thing as primary sources of case-law are also illustrated by the way in which, even where a legal principle has been clearly established, the Courts will not carry its application to the point of absurdity. Thus in *Dalton v. Angus*³, Fry J. (at p. 775), after stating that the whole law of prescription, and the whole law which governs the presumption or inference of a grant or covenant, rest upon acquiescence, and that 'it is plain good sense to hold that a man who can stop an asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and negligence,' goes on to say:—

'In the case of air, it is physically possible for the adjoining owners to build a lofty wall round a windmill, and shut out access to air; and in case of underground water it would, at least in some cases, be physically possible to construct a water-tight barrier through all the water-bearing strata of the soil; but such cases would require such an unreasonable waste of time and money that the not doing of them has been held to impart no acquiescence in the flow of air and water respectively.'

And with respect to the question which was, in that case, up for decision, as to one who has built a house upon his land, acquiring a right to support to his house as against the owner of the adjoining land, he says:—

¹ (1857) 1 C. B. N. S. 590 at p. 610.

² (1849) 7 C. B. 515 at p. 564, 78 R. R. 745, 760.

³ (1881) 6 App. Cas. 740.

'It is, of course, physically possible for one man so to excavate his own soil as to let down his neighbour's building, and a man may or may not have occasion to excavate his own land for his own purposes, but such an excavation for the sole purpose of letting down a neighbour's house is of so expensive, so difficult, and so churlish a character, that it is not reasonably to be required in order to prevent the acquisition of a right¹.'

So also in those cases where the law requires the presence of vis major, or the act of God, to exempt a man from liability, it has been decided that anything may be held to amount to vis major if it is practically impossible to resist it, even though not physically impossible so to do. Thus in *Nichols v. Marsland*², where one who had stored water on her land, and had used all reasonable care to keep it safely there, was held not liable for injury caused to her neighbour by an escape of the water, which was the result of an extremely severe storm, Bramwell B., delivering the judgment of the Court of Exchequer, says (at pp. 258-9):—

'Every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called an act of God, or vis major. No doubt not the act of God or vis major in the sense that it was *physically* impossible to resist it, but in the sense that it was *practically* impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community³.'

Both these cases, however, might as well have been included in the next division of our subject, as illustrating practical considerations as a primary source of case-law.

A. H. F. LEFROY.

(To be continued.)

¹ See, however, per Lord Selborne L. C., S. C. 6 App. Cas. at p. 797, who says:—'It would not be reasonably consistent with the policy of the law in favour of possessory titles, that they should depend, in each particular case, upon the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting them.'

² (1875) L. R. 10 Ex. 255.

³ It may be noted, however, on the other hand, that limitations to the application of a principle may be so firmly established by precedent, that Courts cannot extend it to cases to which otherwise they would have deemed it just and right so to do: *Britain v. Rossiter* (1879) 11 Q. B. D. 123 (taking a contract out of the Statute of Frauds on the ground of part-performance), in connexion with which case, *McManus v. Cooke* (1887) 35 Ch. D. 681, may also be referred to. And even if there be a conflict of authorities, a judge is not at liberty to follow one set rather than the other, merely because the former gives the law as he thinks it ought to be. He is bound to consider what is the general tendency of the law upon the point before him, and decide in accordance with that; *Usill v. Hales* (1878) 3 C. P. D. 319.

THE MARSHALLING OF MORTGAGES.

IT is proposed in this article to state in Digest-form the principles which govern the doctrine of 'Marshalling,' and to add a few supplementary remarks by way of comment.

(1) MARSHALLING DEFINED.

Where a paramount creditor has a definite enforceable charge against separate properties created either expressly or by operation of law¹ whilst they remained in the same ownership², then any person interested in the equity of redemption of a portion only of the entirety of the properties charged who is prejudiced by the exercise of the paramount creditor's rights against that portion is entitled to the extent of the value of such portion³ to stand in his place⁴ by way of marshalling against the other property charged.

Illustrations.

(a) Whiteacre and Blackacre are both mortgaged to *A*, and then Blackacre only is mortgaged to *B*. If *A* exhausts Blackacre, *B* can stand in his place against Whiteacre to the value of Blackacre.

(b) *A* has a charge on a ship only. *B* a bottomry bondholder has a charge on both ship and cargo, since their ownership is different the Court will not marshal against the cargo owners in favour of *A*⁵.

(c) *A* mortgages Blackacre and *B* mortgages Whiteacre to *C* to secure the same debt. The equity of redemption of Blackacre having been sold to *D*, he can marshal against *B* as to Whiteacre for the value of Blackacre exhausted by *C*⁶.

(d) Defendants had a lien on the proceeds of sale of a brewery for their charges as auctioneers, and plaintiff held a subsequent equitable charge thereon. The brewery belonged to a principal for whom defendants also held the proceeds of furniture belonging to him, but on which they had no lien. The right as to the furniture-fund as between defendants and their principal being a mere set off, held that plaintiff had no right to marshal against it⁷.

¹ *Mozon v. The Berkeley, &c.*, 62 L. T. 252.

² Except in cases like illustration (c).

³ *Oradock v. Piper*, 74 B. R. 87.

⁴ As to right of subrogation see head note *Aldrich v. Cooper*, 7 R. R. 86.

⁵ *The Chiochia* [1898] P. 1.

⁶ *Going v. Farrell, Beatt.* 472.

⁷ *Webb v. Smith*, 30 Ch. D. 192.

(2) GENERAL RULE AS TO MARSHALLING.

*The Court will only enforce marshalling having regard to the rights of all parties interested in the property affected, but a right to marshal which would otherwise arise may be affected by prior contractual rights of the parties*¹.

(Sub-rule 1.)

*The Court will not when directing marshalling interfere with the rights of the paramount creditor against all or any portion of the property on which he holds security*².

(Sub-rule 2.)

*The Court will not marshal to the prejudice of the rights of persons interested in the equity of redemption of the property affected claiming through the mortgagor, though not acquired for valuable consideration. A trustee in bankruptcy is in the same position as the mortgagor himself*³.

The principle applicable to this branch of the subject appears to be that a man shall not derogate from his grant, and was stated by Lord Hatherley thus:

‘A person having three estates, which we will call *A*, *B*, and *C*, with mortgages upon all three, executes a voluntary settlement of one of the estates, say *C*, and afterwards creates a mortgage upon *B* alone, I apprehend that he cannot . . . affect the interests created in third parties by this doctrine of marshalling, that is to say, he cannot throw the mortgages of *A*, *B*, and *C* upon the estate conveyed away by voluntary settlement in order that he may have *B* entirely clear and free from mortgage debt’⁴.

(Sub-rule 3.)

*The Court in marshalling will adjust the rights of the respective assignees of the mortgagor by directing the claim of the paramount creditor to be apportioned between the assignees of the various properties according to their values*⁵.

If Blackacre and Whiteacre are mortgaged to *A*, and the equity of redemption of Blackacre is afterwards sold to *B*, should *A* in realizing his security exhaust Blackacre only, then *B* can clearly, as against the mortgagor, marshal against Whiteacre to the extent of the value of Blackacre—indeed this is but a simple example of the ordinary rule—but should the mortgagor have subsequently

¹ As in *re Mower*, L. R. 8 Eq. 110.

² *Webb v. Smith* (*supra*); *Mazon v. Berkeley, &c.* (*supra*); *Wallis v. Woodyear*, 2 Jur. (N. S.) 179.

³ *Re Cornwall*, 61 R. R. 39.

⁴ *Dolphin v. Aylward*, L. R. 4 H. L. 486.

⁵ *Flint v. Howard* [1893] 2 Ch. 54; *Mazon v. Berkeley, &c.* (*supra*).

dealt with both properties in favour of mortgagees, or other purchasers for value, the question arises, how are the rights of those claiming in the equity of redemption of the different properties to be adjusted?

It is now clearly settled that the prior incumbrance existing over all the properties must be apportioned between the respective assignees of it according to the value of the portion in which each is interested.

Flint v. Howard, mentioned in sub-rule 3 it may be urged, is not a case of marshalling, but it is submitted that it is. It was there decided that where Blackacre and Whiteacre have been mortgaged to *A* and the equity of redemption in both properties has been assured to *B* and *C*, then either *B* or *C* having redeemed the incumbrance can claim that as against his property it must be so apportioned that each separate property is only rateably liable. It seems, therefore, to be correct in treating the right to apportionment in such cases as this as belonging to the rule of marshalling. It is in fact only anticipating what the Court would do under the same circumstances in case the incumbrancer had realized one only of the properties over which his remedies extend.

An argument against the right to apportionment in such circumstances which may be urged is that when the mortgagor disposes of one of the properties by way of mortgage, or sale, the assignee's right to marshal will prevail against the mortgagor as owner of the other property, why then should the first assignee be in a worse position by a subsequent disposition of the remaining properties? This point was alluded to by Lord Justice Kay in *Flint v. Howard*. 'If,' said he, 'it had been decided that after the mortgage of one of the properties to *B* the mortgagor could not alter *B*'s position by mortgaging the other to *C*, that would be intelligible.' But it is submitted that the rule of apportionment now firmly established is founded on good sense, and if the argument against it had prevailed it would have added another impediment to dealings with equities of redemption.

To judge from the paucity of modern cases on the subject, the rule of marshalling does not frequently arise, but where, for example, a builder in a large way of business fails, having mortgaged many properties to many different mortgagees, the adjustment of marshalling may give rise to complexity. When the dates of the different incumbrances have been ascertained (and it is scarcely necessary to say that where land not subject to a trust for conversion is concerned, the priorities will be governed by those dates and not by the rule affecting the assignment of choses in action), and when also the facts have been tabulated in convenient form, it

will be found easier to determine the various rights of those concerned.

To take a concrete case, let the following be supposed :

- (1) 1890, 1 Jan. Mortgage for £1,000 to *I. S.* of Blackacre, Whiteacre and Greenacre.
- (2) 1895, 1 Jan. Mortgage for £500 to *I. D.* of Blackacre.
- (3) 1900, 1 Jan. Mortgage for £500 to *R. R.* of Whiteacre.
- (4) 1905, 1 Jan. Mortgage for £500 to *F. E.* of Greenacre.

We will assume that *I. S.* sells Blackacre for £1,000 which satisfies his debt. *I. D.* will then be entitled to stand in the place of *I. S.* against Whiteacre and Greenacre to the value of Blackacre (i. e. up to £1,000), and assuming that the value of Whiteacre and Greenacre is sufficient to satisfy *I. D.*, how is his £500 to be adjusted between *R. R.* and *F. E.* Under sub-rule 3, above alluded to, this £500 must be apportioned between Whiteacre and Greenacre.

This article does not pretend to exhaust the subject of marshalling, but the writer believes that the foregoing rules suggested will be found to embody the main principles of the cases which bear on this topic, and are cited in those textbooks which treat of it.

W. STRACHAN.

JEREMY BENTHAM¹.

THE modern student has small reason to complain of lack of material for the study of the Utilitarians and their doctrines. Of quite recent years have been published Mr. Roylance Kent's study of the English Radicals, Sir Leslie Stephen's monumental work, and Dr. Albee's history of the philosophy, and now we have before us the first biography, within a reasonable compass, that has been published of Jeremy Bentham, the father of the sect. Mr. Atkinson says in his preface that 'this sketch of his (Bentham's) life and work has been published in the hope that it may induce some readers to seek a closer acquaintance with his writings.' We must express considerable scepticism as to the fulfilment of this hope. That a few of his chief writings will always be read by students of political philosophy we can well believe.

The Clarendon Press issues editions of the *Fragment on Government* and of the *Introduction to the Principles of Morals and Legislation*, while there appears to be a steady demand for Hildreth's edition of the *Theory of Legislation*. But even in his own time Bentham was not a popular writer. His successor John Stuart Mill, writing in 1838, six years after his death, says of Coleridge and him: 'The writers of whom we speak have never been read by the multitude; except for the more slight of their works their readers have been few²'; and in going on to say that they have been 'the teachers of the teachers,' we believe that he correctly sums up the position as far as Bentham is concerned—appreciated by students, but 'caviare to the general.'

We do hope, however, that even if Mr. Atkinson's book fails to realize his hopes of inducing a larger acquaintance with Bentham's writings, it will itself be widely read, and particularly by the members of the legal profession. It is a most painstaking and brightly written account of his life, and can be read with great interest by those who do not care 'a sixpence' for his philosophy. And the character of Bentham is one of great fascination. From earliest youth to old age (he was eighty-five when he died) he seems to have been

¹ *Jeremy Bentham: his Life and Work.* By Charles Milner Atkinson. 1905. London: Methuen & Co. 8vo. xii and 248 pp. 5s. net.

² J. S. Mill's *Essay on Bentham* in his *Dissertations and Discussions*. Series i. Reprint in Routledge's *New Universal Library*, p. 270.

blessed with perfect health; he had no severe illness, it is not even recorded that he ever complained of indigestion! It is true that he took great care of himself. His tastes were simple, his wants few, and he never consumed anything but the smallest quantity of alcohol, though through Lord Shelburne he came to some degree in contact with the fashionable society of the later part of the eighteenth century. In middle and later life his hours of work, of exercise, and of recreation were regulated with almost mathematical accuracy. There were 'ante-jentacular' and 'post-prandial perambulations'; and more than that an 'ante-prandial circumgyration.' His life is thus described in a letter written by him to a friend, when he was seventy:

'During your stay in London, my hermitage, such as it is, is at your service. . . . I am a single man, turned of seventy; but as far from melancholy as a man need be. Hour of dinner, six; tea, between nine and ten; bed, a quarter before eleven. Dinner and tea in society; breakfast, my guests, whoever they are, have at their own hour, and by themselves; my breakfast, of which a newspaper, read to me to save my weak eyes, forms an indispensable part, I take by myself. Wine I drink none, being in that particular of the persuasion of Jonadab, the son of Rechab. At dinner, soup, as constantly as if I were a Frenchman, an article of my religion learned in France; meat, one or two sorts, as it may happen; ditto sweet things, of which, with the soup, the principal part of my dinner is composed. Of the dessert, the frugality matching with that of the dinner. Coffee for any one that chooses it¹.'

His power of work was great, and the regulation quantity of reading and writing was performed every day from sheer love of it. Yet he was by no means a dry-as-dust with no interests or thoughts beyond 'codes' and 'utility.' He was very fond of animals, and confessed that he always 'enjoyed their society.' 'Love for pussies,' he declares, was the first bond of union between himself and Sir Samuel Romilly, and he and George Wilson were 'fond of mice and fond of cats; but it was difficult to reconcile the two affections.' He insisted that cruelty to animals should be made a crime, but it was fifty years before the principle was recognized in England. Bentham's favourite recreation from early life was music. Before he was seven he was 'in possession of a fiddle in miniature, and able to scrape Foote's minuet'; and in later years he possessed a fine old organ, upon which he used to play for about an hour every day. During his visits to Bowood his violin playing was always in great request.

Mr. Atkinson's volume contains many extracts from Bentham's

¹ C. M. Atkinson, *op. cit.*, p. 182.

familiar correspondence, which was usually in a playful vein, and still makes amusing reading. The critics of the 'selfish philosophy,' as many of its opponents used to call Utilitarianism, might be recommended to read these letters to learn the character of the man who founded that philosophy. Whatever may have been the character of the system, he was assuredly the reverse of a selfish philosopher. These letters and the whole course of his life show that he possessed in an unusual measure the genius for friendship. In fact his peaceful and uneventful life might be described as a succession of friendships, and of friendships seldom interrupted and hardly ever permanently broken. To the care of his disciples Bentham owes the greatest measure of his fame. The Fragment on Government and the Introduction to the Principles of Morals and Legislation were the only considerable works that he published in his lifetime. Dumont was responsible for the *Traité*s (Theory of Legislation), J. S. Mill for the Rationale of Judicial Evidence, and the Collected Works we owe to Bowring. Though his power of work was great, yet he could never bring himself to revise his manuscripts, and his habit of seldom working a subject out to the end, but of going off upon some side issue that suggested itself to him, made his manuscripts a heap of *disiecta membra* that needed all the care of an editor to reduce to a readable form. But he was the 'teacher of the teachers,' his friends and disciples were 'famous in the congregation, men of renown': and so Benthamism became known over Europe, and left indelible marks on the legislation of our own country.

Bentham was not only fortunate in his health and friendships, he was also fortunate in always having a competence, and being therefore able to give unremitting attention to his favourite work. But this, a fortunate circumstance in one sense, was in another a misfortune. He was constitutionally shy, and as he had no reason to work for his living, he never possessed more than a nodding acquaintance with either business or politics—a great disadvantage to a writer on legislation however excellent his principles might be.

Bentham never married. His one love-affair with Caroline Fox would not appear from this biography to have been a very serious matter, in fact there is not much evidence of it at all.

We propose now to briefly bring before the reader some of the more salient features of Bentham's philosophy, considered both as a system of morals and a system of legislation. As every law student knows, the central principle of Benthamism is that known as 'utility' or the 'greatest happiness' principle. 'The greatest happiness of the greatest number,' that was the ideal that moralist

and legislator should keep steadily before their eyes, that was the supreme tribunal before which every act, every custom, and every institution should be tried; the touchstone of morality, the palladium of law. The phrase, indeed, was not his own. It had been invented years before by Hutcheson, and Hume had founded his moral system upon the basis of 'utility.' Bentham is commonly styled the 'Father of the Utilitarians,' and Sir Leslie Stephen begins his history of the Utilitarian sect with him. In this Stephen would appear to be entirely justified, because he sat down to write an history of the English Utilitarians, that is an history of the sect, and more or less a continuation of his English Thought in the Eighteenth Century. On the other hand, Dr. Albee appears to be equally justified in his History of English Utilitarianism in beginning with the Cambridge Platonists, and only about half-way through the book devoting a chapter to 'William Paley and Jeremy Bentham'; because he is writing the history of an important phase of English Ethics, and there Bentham naturally sinks into a comparatively subordinate position. But if this be true, whence comes Bentham's originality? The answer is that he founded 'not a doctrine but a method¹,' and his originality consists not in his philosophical system, but in his uncompromising and detailed application of it.

In fact, as a system of ethics, Benthamism need not detain us long. The whole of the ethical systems founded directly upon utility were well described by the late John Stuart Blackie in the phrase 'Externalism.'

'From Thomas Hobbes of Malmesbury down to Alexander Bain of Aberdeen, the morality of the Utilitarians is a morality in which the moral virtues of the inner soul is as much as possible denied, and the moral virtue of outward institutional or other machinery as much as possible asserted².'

This remark may be illustrated from the extreme importance that Bentham attached to sanctions, and the time he devotes to the classification of springs of action to form his celebrated 'felicific calculus.' Morality, therefore, depends on consequences, not on motives, a doctrine that, however necessary in law, takes all meaning out of ethics. It is the less necessary to indulge in any criticism of his system of morals because it was decisively condemned by his disciple John Stuart Mill in the essay published only six years after Bentham's death. And when a disciple condemns, who shall justify? Bentham's philosophy, remarks Mill,

¹ Stephen, *English Utilitarians*, vol. i, p. 236.

² *Four Phases of Morals*, p. 286.

'will do nothing for the conduct of the individual, beyond prescribing some of the more obvious dictates of worldly prudence, and outward probity and beneficence. There is no need to expatiate on the deficiencies of a system of ethics which does not pretend to aid individuals in the formation of their own character; which recognizes no such wish as that of self-culture, we may even say no such power, as existing in human nature; and if it did recognize, could furnish little assistance to that great duty, because it overlooks the existence of about half of the whole number of mental feelings which human beings are capable of, including all those of which the direct objects are states of their own minds¹.'

But when we pass from the domain of ethics to the domain of legislation we are at once sensible of the strength of a clear general principle that can be applied to every detail, and the very weakness of this principle in the field of ethics was a cause of its strength in the field of law. Bentham had an excellent knowledge of French, in fact he could employ it almost as easily as his mother tongue, and in some respects his methods of thought were more French than English. Now a dominant note in the French political philosophy during the latter part of the eighteenth century was its exaggerated view of the power of legislation. The French revolutionary leaders set about the construction of a new State with the lightest of hearts, and the most touching faith in the efficacy of their principles. Of the magnitude of the task and the difficulties in the way of its execution they had no conception. History to them, as to Gibbon, was 'little more than the register of the crimes, follies, and misfortunes of mankind².' Before the onward march of Reason the institutions, the customs, and the habits that centuries had formed would crumble in the dust. The continuity of history was a doctrine that only hard experience could teach; and only when the generation of the Revolution had passed away did men realize the truth of the saying of Wilhelm von Humboldt, that,

'Constitutions cannot be grafted on mankind like buds on trees. Where time and nature do not come to his assistance, man can make no more lasting work than bind together a few flowers that the first sunbeams will wither³.'

The doctrine of the Rights of Man Bentham's acuteness threw aside; but in his disregard of history he was a true child of the revolutionary age. The 'natural man' he never accepted, but

¹ J. S. Mill, *op. cit.*, p. 297.

² *Decline and Fall of the Roman Empire* (Bury's edition), vol. i, p. 77. This is what Gibbon said of history. The conception of it as worked out in his masterpiece is far different, and far more noble.

³ Quoted in *Cambridge Modern History*, vol. viii. The French Revolution, p. 711.

underlying his theories there is the idea of an average man. He would allow that the circumstances of time, place, climate, and so forth must be taken into consideration, but assumed that such circumstances were superficial and capable of indefinite alteration by the legislator¹.

His works are an unflinching application of the principles of Utility to every department of Law. His philosophy was weak, but his method was strong; in fact he got on very well without any philosophy at all. To every law and to every institution he addressed the one inevitable question, 'What is the use of you?' It was this essential practicality of mind that established his superiority over the philosophers whose general methods he followed. The general trend of thought in England was to extol the British Constitution and English Law as the perfection of human reason. This attitude is exemplified by the Commentaries of Blackstone and the Constitutional Treatise of De Lolme. To such a school of thought the method of Bentham was a rude shock. He dared to speak disrespectfully of time-honoured institutions, and to demand from every one of them clear proofs of their utility. A more bracing method could not be applied to any system. The institutions that were rooted in the affections of the people, and which answered to a social need, would come successfully through the ordeal, the remainder would be condemned upon an intelligible principle.

For such a writer no environment could be more favourable than the first quarter of the nineteenth century, from the rise of Napoleon to the passing of the Reform Bill. 'If I had to begin life again,' Lord Eldon is reported to have said, 'I would begin as an agitator.' The most uncompromising of the Tories, the man who consistently opposed every measure of reform, who 'never ratted'²; even he felt that the times were out of joint, and the agitators flourished as none else flourished. The mass of abuses to be attacked was huge. They have often been described, and there is no necessity to repeat the description in this place; but they formed the most promising subject-matter that any agitator could possibly desire.

Of Bentham's remedies the sovereign one was codification. For judge-made law he had the most profound aversion and contempt. The following witty description of it (from *Truth v. Ashurst*) will appeal to every one who has ever indulged in the ruinous luxury of being one of the parties in a leading case. Case-law may be

¹ Stephen, *op. cit.*, vol. i, p. 300.

² The expression used by the Radical mob of Oxford, 'There goes old Eldon, cheer him, he never ratted.'

a beneficial institution in many ways, but it must always retain the disadvantage of throwing the expense of deciding a new point of law upon the individuals who are unfortunate to raise it first.

'It is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him. This is the way you make laws for your dog, and this is the way the judges make laws for you and me.'

Bentham's idea of codification is in an essential respect different from that of modern writers. The modern method of making a code is to state in an accurate and compendious form the result of a series of judicial decisions without making any alteration in the substance of the law; Bentham's code was a method of effecting huge alterations in the substance of the law. Neither Bentham nor any other reformer would have been satisfied with a codification of the law as it existed in their time. Such a process to them would have appeared to be a stereotyping of abuses, an effective brake to the whole reform movement. The Theory of Legislation, therefore, is an examination *a priori* and *de novo* of the field of Law, and a statement of what, according to the principle of Utility, the law under each heading ought to be. In the matter of arrangement, one of the most important points of a modern code, in fact in the matter of form generally, his method marks no advance on those of his predecessors. So far from agreeing with John Stuart Mill's aphorism that 'he found the philosophy of Law a chaos, he left it a science,' we venture to assert that his contributions to pure jurisprudence are comparatively insignificant. The only parts of his writings that could be classified under that heading are the politico-legal theories contained in the Fragment on Government. His discussion of the question of Sovereignty marks little, if any, advance upon the ideas of Hobbes, though his writings do not give any countenance to the suggestion that he had ever studied the Leviathan¹.

Bentham's supremacy was in the field of Legislation, and it would be well to consider for a moment the exact extent of his influence in that direction. A generation or more ago no writer had any doubt of the extent of it. Sir J. F. Stephen, speaking of the Theory of Legislation, says:—

'If any one would take the trouble of reading it, with an early edition of Blackstone on one side, and a late edition of Stephen's

¹ [Bentham's great difference from Hobbes is that, guided by Hume, as he explicitly states, he rejected the fiction of an original contract, whether of Hobbes's or of Locke's pattern, being the foundation of political society. But this is in the region of political as distinct from legal speculation.—Ed.]

Commentaries on the other, he would be able to satisfy himself that it has met with a degree of success which perhaps no other book ever gained in this country¹.

So Maine, writing in 1861, says—

‘It is impossible to overrate the importance to a nation or profession of having a distinct object to aim at in the pursuit of improvement. The secret of Bentham’s immense influence in England during the past thirty years is his success in placing such an object before the country. He gave us a clear rule of reform. English lawyers of the last century were probably too acute to be blinded by the paradoxical commonplace that English Law was the perfection of human reason, but they acted as if they believed it for want of any other principle to proceed upon. Bentham made the good of the community take precedence of every other object, and thus gave escape to a current which had long been trying to find its way outwards².’

Can we at the present time accept these statements as historically true without qualification? Was Bentham’s influence as real and as deep as it has been represented—was he ‘the teacher of the teachers,’ or was he merely the chief exponent of ideas that were common to the thoughts of his time? It is certainly true that his consistent and avowed followers, the party called the Philosophical Radicals, were an entirely insignificant factor in political life. They held a few seats in the Reform Parliament of 1832, but even that small influence quickly declined, and their leaders left for other spheres of activity, Grote to write the History of Greece, and Molesworth to edit Hobbes.

The answer to the question is, we think, supplied by Prof. Dicey’s recently published Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century. This most illuminating book shows clearly that from the beginning of the Reform period until about the year 1870 the spirit of Bentham was the dominant spirit in English Legislation. The Philosophical Radicals might be an insignificant party, but they were extremists, and the practical common sense and entire want of logic of English political life usually reduces a party of extremists to insignificance. The legislation of that period is strongly individualistic, and the measures of that period are measures advocated by Bentham, because his principles had taken hold of the political thought of the time. Since 1870, as Prof. Dicey points out with no less clearness, the influence of Bentham and of his principles has declined, because it has been replaced by Collectivism as the dominant note in legisla-

¹ Sir J. F. Stephen, *Horae Sabbaticae*, series iii, p. 219.

² *Ancient Law*, p. 78.

tion; a spirit that indeed favours 'Peace' in the abstract, but is more in favour of a strong national policy, and armaments commensurate with that policy; a spirit that favours expenditure rather than 'Retrenchment' where the objects of expenditure appeal to its ideals; and a spirit that regards 'Reform' as the carrying out of a policy that Bentham would have regarded with horror.

Recent events shed a striking light on the change that has come over the methods of legislation. A new Parliament has been elected, pledged amongst other things to Reduction of Expenditure; and their very first legislative performance is to pass an Act for providing meals for school children. The most moderate estimate of the cost of this Act runs into many millions; but it is passed without a division, and practically without opposition. Mr. Harold Cox, apparently the only representative of Benthamite Liberalism in the House, could not even obtain a seconder for his amendment¹. It seems safe to say that at any time between 1830 and 1870 such a Bill would have been rejected by the House of Commons with as complete unanimity as it is now passed.

H. J. RANDALL.

¹ The Times, March 3, 1906.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Centralization and the Law: scientific legal education: an illustration.

With an introduction by MELVILLE M. BIGELOW. Boston: Little, Brown, & Co. 1906. 8vo. xviii and 296 pp.

Les Principes sociologiques du droit civil. Par RAOUL DE LA GRASSERIE.

Paris: V. Giard and E. Brière. 1906. 8vo. 434 pp.

Soziologie und Jurisprudenz. Von EUGEN EHRLICH. Czernowitz. 1906. 8vo. 23 pp.

THE two first-named books, one by several learned Americans, the other by one learned Frenchman, are not much alike in form; but they have in common a certain striving after novelty which they could both well afford to dispense with. Mr. Bigelow—known to readers of this REVIEW since its foundation—comes forward as Dean of the Boston University Law School to ‘present’ (as we now read on most playbills) a group of lectures by himself and others. His school, he tells us, stands for the conception ‘that the law is the expression, more or less deflected by opposition, of the dominant force in society . . . law is the resultant of actual, conflicting forces in society.’ There are hints up and down the book that the Law Faculty of Boston University has a mission to combat an unprogressive historical school—perhaps, if we read correctly between the lines, not very far on the other side of the Charles river—which denies these verities. The present writer is not acquainted with any such school, and would not recognize it as historical if it existed. Since Montesquieu’s time, at latest, all students of human institutions who need be considered have allowed that laws are a complex function of race, tradition, and circumstances, and are stable just in proportion as the social environment is so. Sir Henry Maine devoted himself to showing that archaic laws reflect with great faithfulness the conditions, economic and other, of archaic society. Neither does it seem to us a startling observation that, in the region of judicial discretion and the ‘policy of the law’ as well as of positive legislation, the judgment of persons in authority is influenced, if not exactly by the order of ideas which tends to prevail outside, at least by a compromise between the ideas of advanced thinkers and those among which judges or ministers were brought up and formed their minds. The process has been admirably described by Prof. A. V. Dicey in his book on Law and Public Opinion in England; and that book has been warmly welcomed and praised in the Harvard Law Review by the founder of the modern Harvard Law School.

Certainly there is plenty of room for discussion as to the relative importance of different factors in the social environment, and how far this proportion is itself constant or variable. Mr. Brooks Adams, who contributes to this volume some of the letter and, we guess, most of the spirit, appears to hold that economic facts and tendencies count for almost

everything, and the deliberate opinion of the best citizens about the common weal for nothing or next to nothing. Assuming that Mr. Brooks Adams would not go so far as to annex the whole of jurisprudence to the history of trade and commerce, that is an ingenious and arguable opinion; it is not a new method.

Again, the adaptation of judicial opinion to the needs created by the environment can, by the nature of the case, be no more than approximate at a given moment, and the approximation will sometimes be rougher and sometimes closer. Also the process of adaptation is easier under some political constitutions and more troublesome under others. It is quite possible to have the machinery too finely adjusted and too sensitive to external indications, for the first business of legal justice is to be certain. But complaints of excessive friction are more usual, especially where discretion, both judicial and legislative, is confined, as in the United States, within the bounds of a written constitution. Mr. Brooks Adams complains rather loudly. Lawyers, perhaps, are hardly more competent than other enlightened citizens to judge how far he is right. At most it is a question in the borderland of jurisprudence and politics. What presses on our American brethren is the dread of monopoly, the tyranny of combinations killing individualism with its own weapons.

It is rather strange to find Mr. Bigelow spending a dozen pages on a demonstration that Blackstone's definition of law is inadequate. For it is much worse than inadequate: it is Hobbes's definition—in essence, the command of the State—guarded by an addition—'commanding what is right and forbidding what is wrong'—that 'must either be superfluous or convey a defective idea of a municipal law,' as Blackstone's editor Christian had already noted early in the nineteenth century. Hobbes, as is well known, says boldly that in law right and wrong are just what the sovereign declares to be such. Blackstone partly confuses and partly eludes the question. It seems, however, that some learned persons in America are still content with his definition. We do not know of any one here who is. Mr. Bigelow's own constructive contribution is much more interesting. He finds the central idea of legal right in 'freedom to do whatever is reasonable'; and the determination of what is reasonable, under all the conditions and so far as any question is open, is the function of the Courts by which the law is kept a living body of doctrine in contact with the play of social forces. We heartily agree. But surely Mr. Bigelow will not repudiate the historical school here, for he has stated excellently well in modern language that very supremacy of reason which has been asserted in the books of the Common Law through half a dozen centuries. 'No' said Stonore J. early in 1345, taking up his brother Hillary who had said, interrupting counsel and perhaps not seriously, that law was what the Justices chose: 'law is reason' (Y. B. 18 & 19 Ed. III, ed. Pike, p. 379). Fourteenth-century judges may have thought reason a more constant quantity than we do now, but that was chiefly because to them, as to the schoolmen dealing with the law of nature, which is really the same thing, the facts inevitably seemed less complex than they are.

We are a little puzzled when Mr. Brooks Adams speaks off-hand of a corporation as 'being a fiction devised to enable several persons to operate as one.' Has he really never heard of Dr. Gierke, or of the introduction in which Prof. Maitland has commended that very learned author's absolutely diverse theory to English-speaking students? Let Mr. Brooks Adams come forth as a champion of the 'fiction theory' by all means, if he will; it rather wants one. But he is not entitled to take it as undisputed.

Turning to the learned French author's book, we find that M. Raoul de la Grasserie has analysed the elements and formative influences of civil law with much care and industry, and perhaps a little too much minuteness and too many new-fangled terms. We do not think *bilatéralité* and *publicologique* lovely additions to the French language. But *imperméabilité* is longer; and we have seen—only on a shop-front—*imperméabilisation*. The author's philosophy is not always profound, but his book is well arranged and in the main lucid, and should be useful to French students. He seems to think it is improved by inserting the word *sociologie* in the heading of almost every chapter, and declaring that the 'sociology of civil law' is still unworked ground. These formalities, in our opinion, do neither good nor harm. For the rest, his aspirations and dissatisfactions are not remote from those of the Boston University Law School. 'La loi doit être pénétrée d'un esprit pratique, et voilà précisément ce qui lui a manqué jusqu'à ce jour . . . Le grand vice est l'anachronisme.'

M. Raoul de la Grasserie knows something of English case-law, indeed he uses the word untranslated as a term of art, and he wishes that the decisions of the Court of Cassation had positive and final authority. By virtue of the French form of drawing up judgments with concise reasons, this would be more like judicial legislation than the Anglo-American system by which both practitioners and judges in subsequent cases have to extract the *ratio decidendi* from discursive judgments at their own risk. Meanwhile—such is the irony of fate—Mr. Bigelow chafes under the rule of ancient reported cases, and asks, 'Would there be serious ground of regret if at last we should come to German and French ideas of precedent?' So that the learned Frenchman and the learned American envy one another across the Atlantic, each of them unconscious that he is in turn envied. 'Optat ephippia boe, piger optat arare caballus.'

We are by no means sure that the learned Austrian's tract, though much the shortest, is not the best of the three works before us. Dr. Ehrlich points out that a system of law is not merely a set of rules for deciding cases, but part of a definite social structure. Jurisprudence is not merely co-extensive with legislation: 'You cannot teach law without showing to what kind of community it is to be applied.' Nevertheless the rules which legal science has to find and apply can and must in turn modify the frame of society. A purely historical jurisprudence—in the sense, e. g. of trying to bind modern Roman law to the classical interpretation of the Praetor's edict—is impracticable, and law is a living branch of social science.

F. P.

Principles of the Law of Contracts. By the late S. MARTIN LEAKE. Fifth edition by A. E. RANDALL. London: Stevens & Sons, Lim. 1906. La. 8vo. lxxxviii, 915, and (index) 60 pp. (32s.)

THE appearance of another edition of this standard treatise within four years of the last is a welcome sign that the thoroughly sound and careful work of the late Mr. Leake—and, we may now add, his editor Mr. Randall—is appreciated by the profession. Decisions on the general law of contract have not been numerous of late, and Mr. Randall has not only been able to avoid adding to the bulk of the text, but has actually reduced it by one page. The Money-lenders Act is now transferred from the rubric of undue influence to that of occupations restricted by legislation; this was a convenient course and is now more than justified by the decision of the C. A. in *Bonnard v. Dott* [1906] 1 Ch. 740, that a money-

lender who omits to register has no remedy at all. Mr. Randall cites the decisions on the Act without attempting any solution of the difficulties which a learned contributor considered in the last number of this REVIEW, the discussion of open questions not being within the plan of Leake's work as last revised by himself.

Under the head of contracts subject to an implied condition of the existence of a specific thing we find the 'coronation cases' of the last two years duly noted. But even in a book so severely concise as Leake it might well have been pointed out that these decisions, except so far as they are purely on the construction of special contracts, extend the rule laid down in the leading case of *Taylor v. Caldwell* far beyond its original scope; for the failure of the event contemplated by the parties did not, in the coronation cases, make it impossible to perform the agreement according to its terms. A man can let the use of a room with a window, and the hirer can occupy the room and pay for it, whether a procession passes the window on that day or not. Besides, the language of *Taylor v. Caldwell* is clearly directed to the destruction of a material object, not the failure of an expected event. We are far from thinking the later decisions wrong; but they are new decisions on questions raised by a new class of facts.

At p. 437 we read, in Leake's own words, 'A person may promise to a third party to do what he is already bound to do by contract with another; and such promise is a sufficient consideration to support a new contract with the third party; as in the case of a promise by a debtor to pay an assignee of the debt,' who is not entitled to sue in his own name: citing *Morton v. Burn* (1837) 7 A. & E. 19. In the present writer's opinion this is perfectly correct in principle, though much controverted among learned persons and denied by Sir W. Anson and Prof. Williston. But it may be doubted whether *Morton v. Burn* completely bears it out; for payment to the assignee of a bond is not, at common law, a discharge of the original obligation, in other words is not the very thing the debtor was bound to do, unless the assignee is empowered to receive payment as the obligee's attorney; and whether this was so or not in *Morton v. Burn* does not appear from the report. What the Court actually said on this point was: 'This is not a mere nudum pactum, for the defendants promise to pay the plaintiff, a third person, whom they were not bound to pay by their bond; and they promise in consideration of a detriment sustained by the plaintiff at their request, namely, a forbearance to enforce his right in the name of the obligee' (7 A. & E. at p. 26). It is curious that Leake's opinion and this authority were overlooked throughout a prolonged discussion of the question in the Harvard Law Review and elsewhere; though learned Americans are of course not bound to give any English authority more weight than they think it deserves on its intrinsic merits.

F. P.

The Rule against Perpetuities. By JOHN CHIPMAN GRAY, Royall Professor of Law in Harvard University. Second Edition. Boston (Mass. U.S.A.): Little, Brown & Co. 1906. 8vo. 664 and xlvii pp. (26s.)

THE first edition of Mr. Gray's 'Rule against Perpetuities' appeared in 1866. It very soon attracted the attention of conveyancers in this country, and rapidly won recognition as a textbook of extraordinary excellence. His treatise is distinguished by profound and careful historical research,

bold and original criticism of the authorities, and great lucidity of statement and arrangement, and is a mine of learning on all points connected with the creation of future interests in land or chattels personal. Mr. Gray's opinions have impressed themselves on the law of England in more cases than one. His views form part of the groundwork of the judgment of Byrne J. in *Re Hollis's Hospital and Hagus* [1899] 2 Ch. 540, 552, and that of Farwell J. in *Re Ashworth* [1905] 1 Ch. 535, 546, though it must be admitted that in these particular instances there are some conveyancers who would question whether the learned judges were well advised in following Mr. Gray's lead. But although every conveyancer does not agree with Mr. Gray on these points, all must admit that he is one of the most learned and able living writers on the law of real property, that his work takes rank with the classical treatises on that branch of the law, and that he is a worthy successor to the 'men famous of old time'—to such authors as Mr. Fearn, Mr. Charles Butler, and Mr. Joshua Williams. A new edition of his book is most welcome.

The principal alteration in the second edition is the statement (p. 166, § 201) of the rule against perpetuities itself in a new form. In the first edition the rule was stated thus:—'No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.' This, the author says, appears to be correct if we assume that 'condition' includes not only all uncertain future acts and events, but also all certain future events with the exception of preceding estates. But if we decline to make this assumption, and confine 'condition' to uncertain future acts and events, then he propounds the rule against perpetuities in this shape:—'No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.' As an example of the kind of interest which has induced him so to alter his proposition, he cites an estate devised to A and his heirs to begin from a day fifty years after the testator's death—which is too remote, although the event on which it depends is certain to occur. It should be pointed out that the term 'vest' in the author's definition is used in a strict sense, denoting the moment when the future interest conferred emerges from the chrysalis state of 'possibility' into the butterfly existence of the true estate or interest which the common law would recognize as alienable property. It does not comprehend the kind (or spurious kind) of vesting which occurs when a gift is made of a transmissible contingent interest or even of a transmissible and indefeasible *executory* interest, such as a devise to A and his heirs from the end of ten years after the testator's death: see §§ 114, 118, pp. 87, 90; Fearn C.R. 559, 560.

Other interesting additions to the text of the first edition are the remarks (§§ 298 a—298 h, pp. 265–9) on the case of *Whitby v. Mitchell*, 44 Ch. D. 85, and on Mr. Charles Sweet's defence of the decision there given in the pages of this REVIEW (L. Q. R. xv. 71); and those dealing with the question of putting persons entitled in default of appointment to their election, where an appointment, void for remoteness, has been made to persons who are objects of the power (see §§ 561 a–f, pp. 432–6). On this point the learned author submits that the decision of Kekewich J. in *Bradshaw v. Bradshaw* [1902] 1 Ch. 436, is to be preferred to that of Farwell J. in *Re Oliver's Settlement* [1905] 1 Ch. 191, which was followed by Warrington J. in *Re Beale's Settlement* [1905] 1 Ch. 256. There is now added to the Appendix a reply to the criticisms of Sir Howard Elphinstone and the late Mr. Challis, published in this REVIEW (L. Q. R. ii. 394; iii. 403) on

the author's statements in the first edition with respect to the effect of the statute of *Quia Emptores* in putting an end to determinable fees.

The Appendix also contains a reprint of the substance of the very interesting articles contributed by the author to the Harvard Law Review on Future Interests in Personal Property, General and Particular Intent in connexion with the Rule against Perpetuities, and Gifts to Indefinite Persons for Non-charitable Purposes. In the last of these he criticizes with considerable force the decision of North J. in *Re Dean*, 41 Ch. D. 552. The first was originally prefaced by an amusing dialogue in Socratic form; and in the book this dialogue is happily preserved in a footnote for the delectation of all those who like, when they plunge into the stormy sea of remoteness of limitation, to hold fast on a saving sense of humour. In this context and with reference to the acuteness of the controversy waged in this REVIEW, and in Mr. Gray's book, over the origin and antiquity of the rule in *Whitby v. Mitchell*, it may not be impertinent to relate the following anecdote, which the writer received from a very high authority. A learned counsel practising at the common law bar was retained (amongst others) to argue a case depending on the construction of a will of realty. A perusal of his brief had brought him little enlightenment as to the nature of the question involved. So at the consultation, with a laudable desire to increase his knowledge of the point at issue, he inquired, 'But what do the other side say?' 'Oh!' said the instructing solicitor, 'they say that it isn't an executory devise at all; they maintain that it's a contingent remainder.' A look of horror and sadness overspread the inquirer's features, whilst he exclaimed, 'Do they say that? *The infernal scoundrels!*'

T. C. W.,

A Treatise on the Law of Evidence as administered in England and Ireland, with Illustrations from Scotch, Indian, American, and other Legal Systems. By His Honour the late Judge PITT-TAYLOR. Tenth edition by W. E. HUME-WILLIAMS, K.C. Two volumes. London: Sweet & Maxwell, Lim. 1906. La. 8vo, ccxlii and 1351 pp. (£3 3s.)

THE task of editing a famous textbook is not, perhaps, a very enheartening one, for, like the wine and bottles of Scripture, there seems to be some essential incongruity between new and old. Personally, we believe that whatever success is to be achieved in this direction must be sought, not in the English fashion of disguising the blend, but in the American of exhibiting it by brackets or otherwise as obviously as possible. The effect of the two methods is well exemplified in the present case, for whilst in the States the authority of Greenleaf on Evidence has been preserved intact through sixteen editions, here that of Taylor, whose work was taken almost bodily from it, runs the risk of gradually disappearing. We had hoped that some attempt to avert this might have been made in the present volumes, but from the numerous tests we have applied, it seems clear that they represent not the original Taylor restored and brought up to date, but merely the 9th edition by Mr. Pitt-Lewis noted up, a very different thing. Thus s. 127 A of the present edition, copied verbatim from Mr. Pitt-Lewis, states, 'Another presumption of law is that arising from the possession of stolen property;' while s. 127 B states, 'This presumption is in all cases one of *fact*,'—making nonsense of the rule. What Taylor wrote, however, was perfectly consistent, viz.: in s. 140 that 'Possession of stolen property is *prima facie evidence* of theft, &c., and in

s. 141 that 'This presumption is in all cases one of fact.' Another innovation which strikes us as by no means an improvement is the abolition of Taylor's headlines indicating the subject-matter of every page, and the substitution therefor of the bald title, 'Taylor on Evidence,' somewhat copiously belied, it may be thought, throughout the work. It is not quite correct, therefore, to state, as is done in the preface, that 'The original text has, as far as possible, been left untouched, and it is hoped, unspoiled.'

Apart from these features the general work of revision, no light task in a book of these dimensions, appears to have been very carefully and accurately done, as may be seen, e. g. in ss. 600 and 1691, where the views of Mr. Taylor as to the effect, respectively, of an acknowledgment by one of several partners, and of an unsatisfied judgment against joint and several debtors, have been duly corrected in the light of recent decisions. A commendable departure from Mr. Pitt-Lewis's scheme has also been made in abolishing the cumbrous double Table of Cases and reverting to the original and sensible plan of giving one set of case-references in the footnotes. A great deal of fresh matter, accumulated since the last edition, has necessarily had to be added, notably that entailed by the Criminal Evidence Act, 1898. Here, so far as we are aware, no important case has been omitted; but elsewhere this cannot truthfully be said. Thus, no reference appears to be made to *Higgins v. Dawson* [1902] A. C. 1, *N. E. Ry. v. Hastings* [1900] A. C. 260, *Dashwood v. Magniac* [1891] 3 Ch. 306, C. A., *Olley v. Fisher*, 34 Ch. D. 367, *Re Seal* [1894] 1 Ch. 316, or *Cowen v. Truefitt* [1899] 2 Ch. 309, as to the admission of parol evidence; *Allen v. Allen* [1894] P. 248, as to cross-examination in divorce cases; *R. v. Gunnell*, 16 Cox 154, C. C. R., as to evidence of knowledge; or *Nash v. Ali Khan*, 8 T. L. R. 444, as to oaths; while the recent decisions following *Selwood v. Mildmay* and *Lindgren v. Lindgren* might with advantage have been given under s. 1222. *R. v. Gloster*, 16 Cox 471, is noticed, but for one only of the two points decided. The present editor doubts, apparently upon insufficient grounds, whether the rule against bastardizing offspring by statements as to non-access still exists (s. 637 n.); this rule, however, was expressly recognized both in the *Aylesford Peerage* case, 11 App. Cas. 1, and the *Poulett Peerage* case [1903] A. C. p. 399. He also queries the correctness of *Johnson v. Lindsay*, 53 J. P. 599, in which statements made by a workman after an accident were rejected as admissions against the master (s. 750 n.), remarking that it is difficult to see why the evidence was not admissible as part of the *res gestae*. But, the occurrence being over, the facts appear to fall directly within the authority of *Agassiz v. Lond. Tram. Co.*, 27 L. T. 492, a case which, by the way, might usefully have been cited, where statements by a conductor were excluded on both grounds. S. L. P.

Roman Private Law. By R. W. LEAGE. London: Macmillan & Co., Lim. 1906. 8vo. xi and 429 pp. (10s. net.)

THIS work purports 'to give, as simply as possible, the subject-matter of the *Institutes* of Gaius and Justinian, following, in the main, the original order of treatment.' It follows the usual lines of a college tutor's lectures at one of our Universities and supplies a distinct want, for hitherto Roman law students have had to choose between the fuller and more ambitious works of writers like Girard, Sohm, Moyle, and Hunter, and manuals of a scrappy and meagre character which are bluntly described as 'cram-books.'

Mr. Leage embodies in his work almost every topic which comes pro-

perly within its scope, and his treatment of every branch of the subject is clear and adequate, particularly of the branch relating to Obligations, which from an educational point of view is the most important of all.

The work, however, is not altogether free from blemishes. On pp. 129 and 159 Mr. Leage appears to confuse the title to *fructus* by *perceptio* with that by *separatio*, and to draw not the slightest distinction between the respective titles of the usufructuarius, the colonus, the emphyteuta and the bona fide possessor. His description (p. 266) of the borrower's obligation in *mutuum* to restore 'not the thing itself, but its equivalent in value' is too loose; one would not gather from it that the borrower was bound to restore things of the same generic kind equal to those borrowed in quality and quantity. On p. 348 he speaks of *mutuum* as 'not based in any sense on consideration,' whereas the whole *causa* which made it enforceable at all was the valuable consideration of performance on one side. Roman law, of course, has no general notion answering to the 'consideration' of the Common Law; but if this was in the author's mind he should have been more explicit. Fideicommissa owed their *legal* origin not to custom as a source, p. 4, but, as Justinian clearly tells us, to the express enactment of Augustus (Ins. ii. 23), as our author himself recognizes on p. 225.

The classification of *Ius Publicum* under the headings 'Libertas,' 'Civitas,' and 'Familia,' is due, not as implied on p. 44, to 'modern civilians,' but to classical jurists like Paulus (see Dig. 4. 5. 1).

The statement on p. 320 that an obligation was dissolved when its *object* became impossible without the fault of the debtor is probably too wide, the discharge of an obligation in Roman law 'interitu rei' being apparently limited, as suggested in the recent case of *Krell v. Henry* [1903] 2 K. B. 748, 'to cases where performance of the contract becomes impossible by the cessation of the existence of the thing which is the subject-matter of the contract.'

The genitive in the expression 'furtum usus eius possessionisve' is usually now regarded as a genitive of respect, and the phrase is not now translated as on p. 323 theft 'of its use or possession.'

We would criticize also certain faults of arrangement. We should expect the subject of privileged wills, including the soldier's will, to be referred to under the heading, 'How wills are made' and not banished, without even a cross-reference, to a note eighty-three pages further on.

The edictum perpetuum of each Praetor was made up of edictum tralaticium and edictum novum, while there might be many edicta repentina. It is surely, therefore, a cross-division to divide the edicts of earlier times into (a) the edictum Perpetuum, (b) the edictum Repentinum, (c) the edictum Tralaticium, (d) the edictum Provinciale, &c. (p. 12).

So, too, we think the method of discharging an obligation 'ope exceptionis' should be contrasted rather than co-ordinated with the several methods of discharge *ipso iure*.

'Oligation,' p. 274, should be added to the 'errata'; and the words 'is good without notice' (p. 315) should refer not to a negotiable instrument but to its assignment.

Notwithstanding, however, occasional inaccuracies and terminological inexactitudes, we think the work before us possesses considerable educational value, and sets forth in clear and simple language an excellent bird's-eye view of the whole field of Private Roman Law.

It will be gratefully welcomed by students who wish to acquire from an English textbook, contained within a reasonable compass, a sound and rational knowledge of the elements of the subject.

S. H. L.

Compotus Vicecomitis. Die Rechenschaftslegung des Sheriffs unter Heinrich II. von England. Von Prof. Dr. PAROW. Berlin. 1906. 8vo. 62 pp.

DR. PAROW has founded his essay upon good materials. He has read with apparent care the Pipe Rolls of Henry II as printed by the Pipe Roll Society. He has made himself familiar with the *Dialogus de Scaccario* in its latest edition and with the classical work of Thomas Madox. The various essays of Mr. J. H. Round have not escaped him, and he has perused the Constitutional History of Bishop Stubbs. If he had added to his reading Mr. G. J. Turner's paper on the Sheriff's farm published in the 12th volume of the Transactions of the Royal Historical Society and certain portions of the Red Book of the Exchequer, he would have saved himself a good deal of work and avoided some errors. But with due allowance for the circumstances under which Dr. Parow has worked, it may be affirmed that he has used his materials well. His tract contains a clear and sufficient account of the constitution and working of the Exchequer of Henry II, and is a sure guide among the arithmetical intricacies of the audit of the sheriff's account. Here and there indeed an error may be noted, but in the main his results stand the test of comparison with those of other students. For instance in Dr. Parow's list of the farms of the counties only two amounts differ from those arrived at by Mr. Turner in the paper already mentioned. In one case Dr. Parow expresses a doubt of his own result; in the other (Essex and Hertfordshire) he has certainly fallen into an error; and no one who has tried the same path will wonder at it. The portion of the essay devoted to an attempt to extract from the Pipe Rolls evidence as to the financial condition of King Henry II is interesting, and has clearly cost much labour. Dr. Parow is so thoroughly aware that his results are only true within limits and do not afford a basis for comparison with modern times, that it is not necessary to discuss how far his results justify the labour expended upon them.

While the essay may be commended as a good general introduction to the subject, it must be allowed that it contains too many small errors. English mediæval law and institutions outside the special subject of the paper seem unfamiliar to the author. Some of the following *corrigenda* will illustrate this characteristic. P. 8, it is impossible to accept the suggestion that the Treasurer and Chancellor were paid by the revenues of estates appropriated for that purpose. P. 24, Dr. Parow's printer, who has not served him well, has made nonsense of the arithmetic. P. 30, 'Perreton' is in Somerset, not in Dorset. P. 32, It is not essential to an honour that it should extend over several counties; instances to the contrary could be given. P. 43 n.: There is nothing romantic in the transaction described. *Comitissa*, a Jewess of Cambridge, married her son to an unnamed Jewess of Lincoln without the King's licence; and all the parties to the transaction made fine for their share in it. Possibly Dr. Parow had been misled by the unusual name. P. 51: *Cambitores* are the king's moneyers, not exchangers as Dr. Parow suggests. P. 54, the phrase 'das nicht verteilte folcland' was written by one who had not known Dr. Vinogradoff; but it is fair to say that the 'ager publicus' theory persists in some quite recent English publications whose authors or editors should have known better. On the same page socage is defined as tenure by labour services; and in several places we read of two kinds of serjeanties great and little. On consideration Dr. Parow would probably

withdraw the first definition and admit that the second distinction was not known in the reign of Henry II.

In the preliminary portion of his essay, Dr. Parow charges upon English students an improper neglect of the teaching of Rudolph Gneist, which he sets down to their passion for discovering continuity in history. No doubt some writers have been too ready to discover in the council of the Norman Kings a survival of the Witenagemot of pious memory. But on the other hand a catastrophic theory of the Norman conquest involves equally unthinkable assumptions. Even the Exchequer of Henry II sprang in part from pre-Norman roots; and those parts of it survived the conquest, survived the introduction of a keener and more capable administration, and only perished as late as 1834. And what of the very word 'Sheriff'? But there are those in Germany who preach more and other things in the name of Gneist than he ever taught. C. G. C.

The Law of International Copyright, with special Sections on the Colonies and the United States of America. By WILLIAM BRIGGS. London: Stevens & Haynes. 1906. La. 8vo. xvii and 850 pp.

THE allegation, contained in the preface of this book, to the effect that it is 'the first work in English on the Law of International Copyright,' is somewhat misleading. If the author means that it is the first English work dealing *exclusively* with International Copyright, his assertion may possibly be true, but this separate treatment of one branch of copyright law is not in our opinion desirable, as the international rules are so closely connected with the other rules, that a book dealing exclusively with the former must necessarily be wanting in intelligibility; thus, for instance, the absence of a systematic exposition in the book before us of the distinction between an author's right relating to unpublished matter (common law copyright) and statutory copyright relating to published matter, or of the distinction between copyright and performing right must render certain parts of Dr. Briggs's book very puzzling to a reader whose information is not derived from other sources; we can hardly conceive how such a reader will be able to understand the following passage, which may also serve as a typical specimen of the author's mode of expression and of reasoning:—

'Lecturing Right.—Another question which will doubtless be dealt with by the Conference of Berlin is that of lecturing right. A lecture is not essentially a dramatic work, though sometimes the line of distinction may be hard to draw; it is clearly neither a dramatico-musical nor musical work. Hence it does not come within the scope of Art. 9, though, if it had been reduced to literary form, it gains *copyright* under Art. 2 either as a published or unpublished literary work, according as it has or has not been issued to the public in printed form' (p. 302).

If the assertion quoted above as to the pioneer character of Dr. Briggs's work was intended to convey that he deals more completely or more instructively with the subject of International Copyright than the previously existing English works, we cannot admit the truth of his allegation; the subject of International Copyright no doubt occupies a larger amount of space in his work than in any other English work, but this is chiefly due to the diffuseness of his style, to the frequently recurring repetitions, and to the addition of numerous aphorisms of doubtful value on quasi-philosophical, quasi-economic, and quasi-juridical matters. We are unable

to discover any feature in Dr. Briggs's work which would make it appear more suitable for purposes of instruction or reference than the previously existing works. A reader who wishes to obtain a clear and comprehensive general view of English copyright law, including the law of international copyright as applied by English Courts, will still be best served by Mr. Scrutton's treatise; a reader looking for accurate and complete information on foreign and colonial law will find it in the last edition of Mr. Copinger's work, and a reader specially interested in the copyright law of the United States will obtain everything that he wants from Mr. Macgillivray's book on the subject of copyright. E. S.

A Treatise on the Law relating to Sale of Real Estate and Chattels Real.

By T. CYPRIAN WILLIAMS, assisted by J. F. ISELIN. Two Vols.
London: Sweet & Maxwell, Lim. 1904 and 1906. La. 8vo.
xli and 1143 pp. and index (unpaged). (£2 5s.)

WE have already (L. Q. R. xxi. 85) discussed this volume up to p. 873. The new part of this volume contains discussions of Relative disability in equity, Discharge of the contract, Remedies for breach of contract, and the Sale of registered land.

The discussion of relative disability in equity, or in other words of the cases where the sale of land may be voidable in equity, because one of the parties stands, either towards the other, or towards the beneficial owners of the land or of the purchase money, in some relation imposing on him either a conditional or an absolute disability to take under the contract, is remarkably good, and perhaps we do not err in saying that this discussion is perhaps the best that the author has ever written. The discussion of the Discharge of the contract is divided into two main headings, (1) the discharge of the contract before breach and by performance; (2) breach of the contract and discharge therefrom after breach. We should much like to place before our readers the excellent doctrine contained in this chapter, but we prefer to consider the most interesting part of the book, viz. the discussion of sale and mortgage of registered land. It cannot be denied that the results of compulsory registration have been most unsatisfactory, as the expense of dealing with land in compulsory districts has been increased. While the Land Transfer Acts offer great facilities for conveying the entirety of a landed estate, they are wholly unfit for the common ordinary commercial dealings with land, such as constantly occur on building estates. Those who are in favour of registration of title ought to be very grateful to our author, as he gives such a clear statement of the merits and demerits of the Acts as will render it comparatively easy to see what amendments ought to be made in order to render the Acts workable.

The author commences the discussion of the procedure as to registered land with an account of the rights and duties of the vendor and purchaser of registered land under an open contract. He points out that the register alone is good evidence that the vendor is registered as proprietor of the land, with such title either absolute, good leasehold, qualified, or possessory, as is stated on the register, that the mere possession of the land certificate showing that the vendor is registered is not sufficient, as the land may have been sold or foreclosed under a statutory charge created without handing over the land certificate, and that in either case a person, other than the person who appears by the land certificate to be the proprietor of the land, may have been registered as pro-

prietor; and that, therefore, it is essential for the purchaser to ascertain the present condition of the register either by actual inspection or a fresh certified copy. This will show whether there are any estates, interests, or rights (other than those declared not to be incumbrances), which will not either be conveyed to the purchaser, or be extinguished by the effect of the registered transfer from the vendor to him. The author then discusses the manner of clearing away incumbrances of various natures.

The explanation (p. 1073) of the effect of a registered transfer where there is an unregistered assurance is both luminous and convincing. It points out that an assurance for value completed by registration operates not as a conveyance of the vendor's own estate, but is essentially the execution of a statutory power enabling the vendor to transfer an estate which may or may not be his own. We are glad to find so high an authority as our author laying down the law on this point, as some persons, perhaps not very familiar with the distinction between property and power, think that the fact that the registered proprietor does not necessarily have the legal fee is a blot on the Acts¹.

The author discusses (p. 1077) four different methods of completion. The conclusion at which he arrives is that where the whole of the land or a title is sold to the same person, the proper manner is to complete under the protection of a priority notice, and that only part of the land is sold either to complete in that manner or by provisional registration under L. T. R. 157.

The discussion (at p. 1081) of the effect of notice to an intending purchaser of equities not protected by entries on the register is most interesting; the conclusion is that where the equity arises from an instrument not protected by an entry on the register the purchaser is safe; but where the equity arises from the fraudulent or blameworthy conduct of the registered proprietor as, for example, where a right of which the purchaser has notice exists to set aside the conveyance to the registered proprietor as obtained by fraud or undue influence; or where the purchaser has notice of facts showing that the registered proprietor is contemplating an actual fraud to the detriment of some person entitled to an unregistered interest, it is not clear that the purchaser could be advised to act in disregard of the notice.

The manner of creating or reserving easements or other rights over registered land, or imposing restrictive conditions on registered land, is explained at p. 1108. The author points out that it is generally proper in cases of this nature to take an assurance off the register, and he also points out what investigation of title ought to be made. His exposition is most valuable.

The question raised at pp. 1113 and 1115, as to the effect of the provision in the Land Transfer Act, 1897, s. 7 (2), that where a registered disposition would, if unregistered, be absolutely void . . . , the register shall be rectified, is of great interest. The author points out that a person taking a transfer or charge from a corporation must satisfy himself that the corporation possesses powers of alienation, for if he should omit to do so, and the transfer or charge were void as being *ultra vires*, and the necessary restriction had not been entered on the register, he might be ejected from the land or lose his charge. The result being that even where a corporation is registered with absolute title, and in certain cases where the vendor is so registered, pp. 1116 and 1141, a purchaser taking under a registered

¹ [Yes, but is not a vagrant and disestablished legal estate at least inelegant, and calculated to puzzle even lawyers who have not the special training of a conveyancer?—Ed.]

transfer cannot be certain that he will retain the land, unless he makes the proper inquiries.

A case which constantly occurs in practice, namely a purchase of registered land from a mortgagee under his power of sale, is discussed at p. 1117, and the procedure, when on the sale of registered land part of the purchase money is to be advanced on mortgage, is explained at p. 1125. The preliminary discussion as to the effect of a registered charge is exhaustive and accurate; the author gives conclusive reasons for the opinion, generally held by conveyancers, that a mortgagee of registered land cannot be advised to rest satisfied with a registered charge alone, and that he must obtain such a security as will vest the mortgagor's estate in him, and he points out two methods of doing so: he then discusses the methods of making the mortgage when the money is to be advanced to the purchaser of registered land before the transfer to him is registered, or to the purchaser of unregistered land in a district where registration is compulsory, and the advance is to be made before the registration of the purchaser. In a note at p. 1135, he discusses and objects to a scheme suggested by a conveyancer whose opinion deservedly bears great weight, namely, for the purchaser to execute and deliver as an escrow before his registration a conveyance of the legal estate to the mortgagee subject to redemption, to be delivered and dated after the registration of the mortgagor as proprietor of the land, and to be supported by a registered charge.

In conclusion, we consider that this volume is excellent, and we heartily recommend it to our readers.

Principles of the Law of Real Property. By the late JOSHUA WILLIAMS. The Twentieth Edition, by his son T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1906. 8vo. lxvi and 741 pp. (21s.)

The Modern Law of Real Property. By the late L. A. GOODEVE. Fifth Edition, by Sir HOWARD WARBURTON ELPHINSTONE and FREDERICK TRENTHAM MAW. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xlv and 612 pp. (21s.)

For the third time Mr. Cyprian Williams has retouched 'Williams on Real Property' since he practically rewrote it in the seventeenth edition. We quote a neat passage from the chapter 'Of Remoteness of Limitation.' 'It thus appears,' says the learned editor, 'that the general principle of legal policy, forbidding all such limitations as tend to create a perpetuity, has been applied to contingent remainders as well as to executory interests. But when we inquire what limitations in particular are held to create a perpetuity, we find that the law has answered the question in one way as regards contingent remainders of legal estates, and in another as regards executory interests and contingent remainders of equitable estates; or, possibly, in a third form as regards equitable remainders. The result is that the subject . . . is particularly distinguished by what the Romans termed *inelegantia iuris*.'

The most interesting new feature in the present edition of Goodeve is likewise the chapter on Perpetuities. Perhaps the very bare statement of the much canvassed decision of Kay J. in *Re Frost* may be taken as signifying that the learned editors accept it with some reluctance. They are more outspoken about the rule that 'all limitations depending or expectant on a prior limitation which is too remote are themselves void for remoteness,' and agree with Mr. J. C. Gray's argument against it in his well-known

work of which the second edition is dealt with elsewhere in our present number¹, notwithstanding that Sir James Stirling felt bound to treat it as settled in *Re Abbott* [1893] 1 Ch. 54, 57.

Sir Howard Elphinstone's ingenious explanation of the rule in *Shelley's* case (p. 224) is not now published for the first time, but we shall be excused for recalling our readers' attention to it. The reason given by Sir Howard is that there is no way in which 'the heirs of A,' a living person, can take as purchasers, for they are an indefinite succession of persons. Therefore the only way of giving effect to such a limitation, following a freehold estate not of inheritance given to A by the same instrument, is to say that it creates no new estate, but enlarges the ancestor's estate into a fee and enables his heirs to take by descent.

One bad historical mistake has escaped correction at p. 127, note (h), where it is said that 'no conveyances of English lands made during the first century after the Conquest are known to exist.' See several examples from the first half of the twelfth century in Round's *Ancient Charters* (Pipe Roll Society, 1888), and still earlier ones in the British Museum Charters published in facsimile in 1903. Perhaps this is less material than it would be in a book intended for novices, which Goodeve, as now revised and enlarged, is not.

A Digest of English Civil Law. By EDWARD JENKS (editor), W. M. GELDART, W. S. HOLDSWORTH, R. W. LEE, J. C. MILES. Book II, Part I. Law of Contract (General), by R. W. LEE. London: Butterworth & Co. 1906. xxii and 158 pp. (5s. net per part.)

THE second instalment of this digest equals, if it does not excel, the first. Here and there, as is almost inevitable, we meet with statements which may be open to doubt, or with omissions which may cause perplexity to a student. If, for example, it be admitted, as we most readily do, that some subjects which we all now know belong to the head of contract presented themselves to our forefathers 'rather as social relationships regulated by law,' we may gravely doubt whether under such subjects can rightly be included, as they are by our authors, insurance and gaming contracts. Insurance belonged to the law merchant so far as it was considered at all. When again we read the statement in Art. 201, that 'All contracts are either:—(a) in writing under seal ("specialty" contracts) or (b) otherwise expressed ("parol" or "simple" contracts),' we ask, what has become of our old friends 'contracts of record' which surely might claim at lowest the honour of being mentioned in a note? Nor is this criticism met by the assertion that a contract of record is not in truth a contract at all, and will be dealt with under Part III, Obligations arising from Quasi-Contract and Tort. The allegation that a contract of record is not a true contract, is but partially sound, for such a contract does in some cases originate in agreement and is then a true contract though expressed in a very singular form. Is it, one is further inclined to ask, well to treat of a specialty contract (Articles 213-219), which seems to mean a contract by deed (Art. 215) without any statement, as far as we can discover, of the nature of a deed itself? For this omission will assuredly encourage the error, almost invariably committed by students, of confounding the characteristics of a deed as such, which need not contain a contract at all, and the characteristics of a contract by deed. Nor, though the point is a small one, can we pass over without protest the use,

¹ P. 323 above.

may we not say the invention, of the expression 'Specialty Contract.' It neither belongs to good English intelligible to ordinary laymen, nor is it in this form a technical term known to English lawyers. We are well aware, to take another point, of the difficulty of dealing in a satisfactory manner, especially since the decision or misdecision of the so-called Coronation Cases, with the legal effect on the validity of a contract of impossibility of performance. But we hesitate to give implicit assent to the doctrine of Art. 294, that a contract is necessarily void if the performance of it is contrary to the course of nature. Can it be said that the pretended proof by Mr. Hampden that the earth was flat rather than round was not contrary to the course of nature? But can it be denied that, had it not been for the existence of the Gaming Act, 1845, Mr. Hampden would have been legally compellable to pay Mr. Wallace £500 because of Mr. Hampden's failure to prove the flatness of the earth? Let us, as a last criticism, add that the authors of the Digest are more successful in the statement of legal principles than in the arrangement or distribution of the topics with which they deal.

Criticism is as different from censure as a judgment from a condemnation, and none of the objections taken to isolated points in this Digest of the Law of Contract are meant even to imply that the publication of which Book II, Part I, forms a portion does not promise to turn out a very remarkable achievement, or that the instalment on the Law of Contract is specially open to criticism. No one can study the Digest without seeing that the attempt to summarize the principles of English civil law promises to be a great success. Of course you cannot look, in a work intended to lay down only the most general legal principles; and that too in broad and intelligible terms, for anything like the minuteness of detail to be found even in the Indian Contract Act or the absolute accuracy of expression which characterizes Leake's Law of Contracts. But the second instalment of the Digest of English Civil Law will prove of great value to any intelligent student. The book is pre-eminently one suited to arrest attention and to excite discussion. English law cannot be learned by mere reading; still no more fruitful course of reading can be suggested to a student than to take the book under review, for which we gather Mr. Lee is specially responsible, and study with care each one of the 371 rules of which it consists. Even in the cases, rare we suspect, in which the rule may be somewhat too wide, a reader will find that it has conveyed to him a substantially true impression, the whole meaning of which is brought out by the mere attempt to examine how far the rule is or is not precisely accurate.

[We are not prepared to follow our learned contributor in dissenting from the Coronation cases, though we doubt whether they were put altogether on the right grounds. See L. Q. R. xx. 3.—ED.]

A Treatise on the Law of Sale of Personal Property, &c. By JUDAH PHILIP BENJAMIN. Fifth Edition, by WALTER CHARLES ALAN KER and ARTHUR REGINALD BUTTERWORTH. London: Sweet & Maxwell, Lim.; Toronto: The Carswell Co., Lim.; Boston, U.S.A.: Boston Book Co. 1906. La. 8vo. clv and 1160 pp. (£2 2s.)

THIS is not a mere posting up of the work done by Benjamin and his former editors, but a thoroughly revised edition incorporating the Sale of Goods Act; moreover the present learned editors do not hesitate to express opinions different from Benjamin's when they find, after full consideration,

that they cannot agree with him. Notably they do so on the question, knowingly left open to some extent by the Sale of Goods Act, what conditions will justify an unpaid seller in reselling the goods. Mr. Benjamin's exposition, however, is preserved, so that the reader may take his choice.

One editorial addition which we are unable to commend is a note on the history of the law of gifts (p. 7). The subject is not strictly relevant to the law of sale, and it is difficult; therefore an excursus on it should be justified by making some real contribution to knowledge or criticism. We do not believe that these learned editors have never looked at the Year Books, or have not heard of the difficulties felt by very learned persons about *Irons v. Smallpiece*, or think that all 'the barbarian invaders of the Roman empire' were just alike, or cannot read the French codes in the original, or accept Canciani's '*Leges Barbarorum*' at this time of day as an ultimate and sufficient authority on Lombard custom, or hold Charles Kingsley a proper person to vouch for warrant in matters of legal antiquity. But this note is so slight in matter and perfunctory in manner that on the face of it all these things might be laid to the writers' charge. And must we really seek the law as to equity refusing to aid imperfect gifts in a case reported only by the *Law Times*? If anything was to be said about gifts at all, the work should have been done much more thoroughly. Another note on the application of the Statute of Frauds, or equivalent enactments, in British possessions beyond seas, is much more satisfactory.

The learned editors do not approve the decision of the Supreme Court of the U. S. in *Norrington v. Wright*, 115 U.S. 188, as to the breach of a contract to deliver goods by instalments, and cite a good many decisions of State Courts to the contrary; but nearly all these are of earlier date. We can certify that the late Mr. Phelps, who then represented the United States at St. James's, and was as good a lawyer as an ambassador, thought the judgment of the Supreme Court correct.

The 'Introductory Observations,' relating partly to Mr. Benjamin and his work and partly to the Sale of Goods Act, are new and interesting.

There is a small mistake which has run through all the editions of Benjamin, and which it may possibly be still material to correct in some jurisdictions. *New v. Swain*, reported in Danson and Lloyd's rare volume of mercantile cases, was not a *Nisi Prius* Case as stated by Benjamin, who seems to have followed Blackburn, and was, in turn, followed by Mr. Chalmers. The law there laid down is confirmed by the Sale of Goods Act, but until 1893 it was supposed not to have the authority of a decision in Banc. In 1898 the editors of the Revised Reports, in reprinting the case from Danson and Lloyd, called attention to the slip (34 R. R. 767). The scarcity of the original report may account for the want of recent verification. Of Blackburn, a most careful writer, we can only say that for once he nodded.

The Law of Torts. By J. F. CLERK and W. H. B. LINDSELL. Fourth Edition, by WYATT PAINE. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xcviii and 880 pp. (30s.)

ALTHOUGH we formed a favourable opinion respecting the merits of the third edition, we little thought that within eighteen months from the appearance of our review in January, 1905, we should be invited to express our opinion upon a new edition. Success of this character materially shortens the task of the reviewer. We have compared the two

editions with a view to discover the added matter, and to estimate the value of the editor's work by the result of the comparison. In the result we must express our opinion that the learned editor has scarcely maintained the high standard which was the distinguishing feature of the earlier editions. Thus the paragraphs introduced at p. 470 relating to implied warranties seem to us to be out of place in a book on torts, not because the reference could be avoided, but on account of the manner in which the subject is presented. No doubt *Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. 608, and *Clarke v. Army and Navy Co-operative Society* [1903] 1 K. B. 155, have this in common, that a retailer was held liable for damage sustained by reason of the nature of the goods supplied, but the ground of liability was different in each case. In *Clarke v. Army and Navy Co-operative Society* it is based upon a breach of duty. In *Frost v. Aylesbury Dairy Co.* it is based upon the breach of a condition implied in a contract. The principle of *Clarke's* case is that adverted to by Lord Esher in *Heaven v. Pender* (1883) 11 Q. B. D. 503, at p. 510, and quoted by Mr. Paine at p. 466. Indeed, from the manner in which he has referred to *Clarke v. Army and Navy Co-operative Society*, at p. 470, n. (b), and p. 471, n. (e), and the more detailed, but insufficient, reference at p. 528, one is almost driven to the conclusion that he has failed to grasp what was actually decided in the case. It is also difficult to appreciate what bearing *Kaufman v. Gerson* [1904] 1 K. B. 591, *Embiricos v. Anglo-Austrian Bank* [1905] 1 K. B. 677, and *Harris v. Flower* [1905] 91 L. T. 816, can have on the law of torts. Again, the abstract (at p. 68) of *Hambro v. Burnand* [1904] 2 K. B. 10, is none too clear.

The editor has also, as it seems to us, proceeded upon the assumption that the text of the third edition could be accepted without revision. This was not so, and in the result much is reproduced that should have been modified or omitted. A really important case like *Earle v. Kingscote* [1900] 2 Ch. 585, appears at p. 50 in a footnote with the words 'and see' prefixed. Then again his analysis of *Christie v. Davey* [1893] 1 Ch. 316, is hardly justified by the report. 'Playing a musical instrument' does not properly describe what were some of the causes of complaint, namely, blowing whistles, knocking on trays and boards, and hammering on a party wall. Indeed, upon the counter claim, North J. held that practising upon the violoncello until past 11 o'clock at night, the practice being bona fide undertaken by the player, to perfect himself, was a lawful act: see [1893] 1 Ch. 328. We may also point out that Savigny's view of possession in Roman law has been repeatedly challenged, and is not generally accepted at the present day.

Turning to more general matters, it is obvious that the proofs have not been read with the same care as on previous occasions. We must repeat the protest that we made against the lengthy footnotes, many of them containing qualifications of what appears in the text. If the matter is not important enough to appear in the text, it is generally the better course to omit it. If, on the other hand, the matter cannot be omitted, it is extremely inconvenient to have to read with one eye on the text and the other on the footnotes. We are sorry to see the editor quoting decisions from the *Times* newspaper. As is well known, the courts do not accept a report, unless its accuracy is vouched for by a member of the bar. Unless the case also appears in the *Times* Law Reports this requisition is not complied with. Nor do the conditions under which newspaper reports are prepared inspire confidence in those who have been behind the scenes. In addition to this, if the case does not subsequently appear in the *Times*

Law Reports, it is invariably due to the fact that there exist excellent reasons why the case should be suppressed. It would take a great deal more than we have referred to to depose this book from its position, but at the same time those who are responsible for future editions will do well to bear in mind that there are rivals with established reputations as competitors for public favour.

A Treatise on Deeds. By ROBERT F. NORTON, K.C., assisted by R. H. DUNN and DIGBY L. F. KOE. London: Sweet & Maxwell, Lim. 1906. La. 8vo. lxx and 694 pp. (30s.)

THIS work is founded upon and is issued in lieu of a second edition of the well-known book upon 'Rules for the interpretation of Deeds' by Elphinstone, Norton & Clark, which was originally published in 1885, and is now re-arranged and in a great measure re-written and re-produced with much additional matter in its present enlarged form.

The book contains about the same number of pages, but by omitting the glossary, which occupied about seventy-five pages in the original work, and by closer printing, space has been made for extensive additions which greatly increase the usefulness of the book, and justify the author's claim to describe it as resembling a new work rather than a new edition.

It is, however, probable that many of those who are familiar with the original book may question the sufficiency of the reason given by the author for omitting the glossary, namely that the meaning of the words there explained can be ascertained by referring to a Judicial Dictionary.

The book retains the method of treatment adopted in the original work, namely stating carefully and accurately the rules or principles of law and then illustrating and explaining the application of those rules by reference to leading authorities upon the points under consideration.

Many of these rules, and much of the learning thus set forth, may be found scattered about in other books, but the collection of the rules bearing upon the interpretation of deeds cannot fail to be of great value to the large class of lawyers, and particularly conveyancers, whose business requires a thorough knowledge of the meaning and interpretation of deeds, and a convenient reference to the latest authorities bearing upon any point which may arise for consideration.

A Treatise on the Law relating to Ownership and Incumbrance of Registered Land, and interests therein; together with the Land Transfer Acts, 1875 and 1897, and Land Transfer Rules, 1903, arranged in a consolidated form. By JAMES EDWARD HOGG. London: William Clowes & Sons, Lim. 1906. 8vo. xix and 474 pp. (20s. net.)

THE preface to this book states that it is, 'so far as it covers the same ground as preceding publications, intended to state the objects, scope, general methods and difficulties of the new system in a somewhat fuller and more convenient manner than has yet been done. The book is also intended to supplement other works by endeavouring to explain the origin of and the reasons for the principal features of the Land Transfer Acts, 1875 and 1897, and by offering solutions of some of the gravest difficulties of the new system.'

At p. 2 will be found an explanation of what is meant by registration of title, and of the distinction between registration of title and registration

of assurances. There is a very interesting account of the history of registration of title in England, commencing with the Report of 1832, being the second report of the Real Property Commissioners, and ending with the last Land Transfer Rules¹. The discussion at p. 38 et seq. of the changes in the substantive law made by the Land Transfer Acts is well worth reading.

The second chapter explains what is meant by first registration, what land may be registered, and by what person, the provisions as to compulsory registration, and the procedure on first registration. . . . In this and in many other parts of the book the incidental remarks are full of interest. For example (at p. 47) the author says, 'With respect to title acquired by long possession and rectification of the register, the proprietorship of the new owner will be the proprietorship of the owner who has been removed from the register notwithstanding that under the general law the fee simple of an owner barred by Limitation Acts is not actually transferred to the person entitled by long possession.'

The author objects (at p. 60) to the permission to register an undivided share of land on the ground that it seems to offer an opportunity for avoiding the compulsory registration provisions; and he points out a manner in which this might possibly be done. We cannot say that we agree with him. If registration is to be compulsory, every man who holds an undivided share of land ought to be able to be registered, and if this will enable compulsion to be evaded, the law should be altered in this respect.

The author suggests (p. 73) that as the Act has expressly recognized the possibility of registration with possessory title in the face of adverse possession, proceedings to register the land or to rectify the register might be made use of to try the substantial question of ownership. This appears to be a very valuable suggestion; but the question whether it will work well in practice requires some consideration. If the dispute is merely as to the construction of documents, and there is no dispute about the facts, probably a procedure under L. T. R. 297 will be an easy manner of obtaining the decision of the Court. But the question whether it is advisable to follow this procedure where facts are in dispute is not so clear. Rule 300 says, 'Upon any application to the Court on reference by or appeal from the registrar a statement shall be prepared and signed by the registrar and forwarded to the Court by him. . . . Facts in dispute shall be proved by evidence as the Court shall direct.'

It will be seen that this rule throws two difficulties in the way of a man seeking to have a question of fact determined; first, he has not the advantage of stating his case in his own words; and second, as the facts are to be proved as the Court shall direct, it is by no means clear that he will be able to obtain the same discovery that he could obtain in an action to recover the land. For these reasons it appears somewhat doubtful whether the suggested procedure would be advisable where the facts are in dispute. We may say that a practice of this kind was introduced some time ago in Trinidad and Tobago, where the Torrens system is in force, and gave rise to some dissatisfaction, though perhaps for extraneous reasons.

The discussion in chapter iii of the nature of the registered estate in land is of great interest, and will repay perusal. The author says (p. 86), 'That the registered estate is not the ordinary legal estate is clear from the fact that an equitable owner, a tenant for life, or even the donee of

¹ A short account of some of the different schemes of registration is contained in articles in 30 *Solicitors' Journal*, entitled 'The Council of the Incorporated Law Society on the Land Laws.'

a power can by registration have conferred on him an "estate in fee simple" or "possession of" land for a leasehold "estate." In another place (p. 90) he says, 'Put in the most general words the registered estate is a group of statutory rights which are new in the sense that they do not exactly correspond in their judicial theory with rights in property as known to the ordinary law, though designed to preserve and confer the same or analogous rights in their practical result.' At p. 97 the author says, 'The possession of the legal estate is really only the technical expression used to denote ownership in English law—it may be called the criterion of ownership; and the scheme of the Land Transfer Acts may be said to aim at substituting for the legal estate another criterion of ownership, i. e. entry on the register or the registered estate.' We consider this to be an accurate statement of the aim of the Acts; unluckily they do not always carry it into effect. The discussion at p. 101 as to the cases where the owner of a legal estate outstanding at the time of first registration can obtain rectification of the register, leaves little to be desired.

At pp. 102 and 114 et seq., the author discusses the nature and effect of a registered charge; the conclusion at which he arrives is that the proprietor of a registered charge seems to be entitled to rely on the entries on the register as conferring on him a title similar in degree, as far as possible, to that conferred on a proprietor of land. At p. 120 he discusses the rights of the registered charges against leaseholders.

The fourth chapter contains transactions *inter vivos*, and is divided into three sections: (1) conveyances on sale in compulsory districts before first registration; (2) transactions on the register; and (3) transactions off the register. The first section is excellent. We doubt, however, the statement at p. 160, that where a mortgage of registered land is made off the register supported by a statutory charge, it is unnecessary to take the precaution of entering a restriction on the register against the registered proprietor of the land transferring it without the consent of the proprietor of the charge, or of handing the land certificate to the proprietor of the charge, for it will be observed that if neither of these precautions is taken the registered proprietor of the land will be able by means of a registered transfer to destroy the legal estate in the land conferred by the unregistered mortgage.

At p. 163 the author discusses the difficult question whether a mortgagee selling by virtue of a mortgage prior to first registration is bound either to be registered or to procure a transfer from the registered proprietor; he adopts the view commonly held by the profession that this case falls within rule 151 L. T. R., and that it is a case for rectification of the register.

At p. 220 will be found a form of strict settlement of registered land. The common practice (see 2 Prid. 282, Brick. & S. 128) is to make the settlement in the same form as if the land were not registered, with a recital that the land is registered, and to support it by proper entries on the register.

At p. 230 transactions with registered land off the registry are considered. The questions discussed are of the greatest difficulty, and are hardly covered by authority. The author states several propositions which we consider doubtful. At p. 231 he says, 'that for practical purposes and regarded as enforceable rights of property, estates and interests off the register created under s. 49 are on the level of equitable interests only in registered land.' He raises the question whether a conveyance by the registered proprietor of freehold land in the ordinary form 'unto A in fee simple to the use of B for life, with remainder to the use of C,' might not

confer an equitable fee on *C* notwithstanding the absence of words of limitation. Again, he says that the conveyance or creation of a freehold estate for life differs altogether in a practical way from a conveyance of the fee, since the grantee would not have the right to be placed on the register. Surely in this case the land becomes settled, and the life-tenant has a right to be registered as proprietor. Notwithstanding the objections that we have raised, we consider that the discussion of these questions will be found very useful.

Chapter v treats of 'Registered dispositions *in invitum*'; and chapter vi treats of 'Succession on death of Registered proprietor.' The most important question discussed in the latter chapter is, What becomes of the fee of registered land during the interval that elapses between the death of the registered proprietor and the registration of his successor? The author submits that the fee is in abeyance.

The necessary limits of space by which this review is bound prevent us from stating the very interesting questions discussed in chapter vii, viz. (1) Rectification of the register, (2) Indemnity for loss, and (3) other remedies.

Lastly, the book contains the Land Transfer Acts and Rules, printed in a consolidated form, that is in a form approximating with respect to the collation of the sections and rules to that in which they would appear if consolidated and re-enacted as a single code or statute.

The final conclusion at which we arrive is that while we do not always agree with the author, the book will be very useful, especially to those practitioners who have to advise on questions relating to registration which are not yet covered by authority.

The Law and Practice relating to Letters Patent for Inventions. By THOMAS TERRELL, K.C. Fourth Edition. By COURTNEY TERRELL. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xxxviii and 627 pp. and index 60 pp. (30s.)

THE first edition of this well-known work was produced early in 1884 when the Patents Act of 1883 came into force. The second edition appeared in 1889, and now, ten years from the third edition, a fourth has been produced by the son of the learned author.

Apparently a strong incentive for its production was the experience gained in the working of the Patents Act of 1902, section 1 of which, at the instance of the Board of Trade, was put into operation in January of last year. Shortly expressed, this section empowered the Comptroller of Patents, in his discretion, to add to a complete specification, by way of notice to the public, the identifying numbers of certain older specifications in which the invention during the preceding fifty years had been wholly or in part described or claimed. Section 2, which came into force immediately on the passing of the statute, sought to remedy defects which had shown themselves in connexion with the compulsory grants of licences to use inventions. So far as we are aware, no case under this section has been reported, even if it has been put into operation, which is doubtful. Consequently, in the present book, little is said concerning compulsory licensing as it is usually termed.

The present edition, already the recipient of judicial commendation (*Cooper Patent Anchor, &c. v. London County Council*, 23 R. P. C. p. 295), comprises 391 pages of case-law and comment, and an appendix of 234 pages of statutes, rules, forms, precedents, &c. It may be considered

one of the best, if there can be more than one best, of the bulky volumes to which we have now become so accustomed as almost to be compelled to suppose that a book of any less size must necessarily be incomplete. The author appears to be well on the road towards a realization of that ideal textbook which we are still awaiting; a work, which exhibiting patent law as a homogeneous and systematized whole, shall set out clearly and concisely those principles to which judges are continually deferring, principles easily won from the rich mine of case-law. Indeed, so ample is case-law, that a code of principles could be compiled with less than the usual difficulty that surrounds similar attempts in other directions. As regards structure, we perceive signs of an endeavour to cast off trammels self-imposed by former generations of textbook writers who, fearful of a wrong generalization or of an incorrect deduction, have not hesitated to cram their pages with solid blocks of judicial dicta, often to the bewilderment of their readers. 'The result of the decided cases' (p. 279) as to what has been held to constitute infringement when either master-patents or patents for improvements were in question, is well stated, and is an instance of what we mean, and affords an example of the generalizations to be met with in the book. The style in which the various propositions are presented is fluent, and effects an easy transition from one subject to another. The introduction of marginal notes materially assists the searcher, as also the Table of Cases, where points in the judgments, e.g. revocation, evidence, amendment, and so on, are placed against the name of each case. The chapter that deals with the practice of the Patent Office under the Act of 1902 is likely to be of value to that increasing number of practitioners who come into contact with the officials. In short, owing to lucidity in exposition, conciseness in expression, and general accuracy in the statement of principles, careful selection of examples, ample treatment of court procedure, and lastly, a matter not to be despised, the general get-up of the book, we may regard this production by Mr. Terrell as entitled to high position among its fellows.

We are glad that the author has not followed in the train of the many who merely set out results of the judicial construction of specifications, and then state the findings of the court when acting as a jury. Usually this is wholly unnecessary, since, when once construction has been determined, no doubt, apart from the consideration of 'subject-matter,' has remained upon the question of fact.

In the ideal textbook, of which we have spoken, one of the main divisions, in our opinion, ought wholly to be concerned with the construction of the specification; for, with construction safely in hand, the majority of the problems that present themselves could be readily solved. The difficulties incidental to infringement, sufficiency of subject-matter in the invention, novelty, adequacy of description, disconformity, relation of master and servant, and so on, are minimized when construction has determined the metes and bounds of the invention. We should then, instead of, or in addition to, finding the question 'What is the invention' cropping up in divers situations, as in the present work, have a dissertation once and for all upon the extreme importance of the answer to this question and of the means for securing it. This chapter on 'Construction' would, in our opinion, take into account the state of affairs in view of which the question arose; for construction in the abstract is practically unknown. The end to be served must be—and is, in practice, although not expressly so stated—continually kept in sight. Construc-

tion for one purpose may for other purposes be totally inadequate or irrelevant. If the subject of construction were properly set out in full, there would be no need to distinguish, as is customary, between the invention and its 'pith or marrow' or 'essence.' The want for such a chapter and for the invention to be defined sufficiently to meet the case in hand, may be gathered, if need be, from the author's summary on page 375 of the 'Questions for Court and Jury.' In common with other textbooks, construction is scattered through the pages of the present work, although it is but fair to point out that a great portion of it appears in the chapter on the 'Complete Specification.'

In a book of the present dimensions there must necessarily be an abundance of matter upon which divergent opinions may be expressed. It is also a pity that the many inaccuracies which it contains have not been corrected before publication. The book as a whole is so successful that to indicate differences of opinion and to point out what we conceive to be defects might be deemed captious, and have the effect of unduly magnifying slight blemishes. However this may be, we will allude to some points, if only to suggest their reconsideration in a future edition. Fewer instances might have been allowed to remain of an unqualified affirmative proposition immediately followed by an adversative, and attended, may be, by a *secus*, a *cf.*, or its equivalent, in a footnote, a method of transmitting information so dear to our forebears but puzzling both to the legal scientist and practitioner. We look in vain for an elucidation of difficulties that the various statutes have raised, but concerning which no authoritative pronouncement has appeared, for in the main the book confines itself only to such points as have actually received judicial or official attention.

We notice, in passing, that 'P. O. R.' is adopted when alluding to the 'Reports of Patent, Design, Trade Mark and other Cases (published under Section 40 (1) of the Patents, Designs, and Trade Marks Act, 1883).' Presumably the abbreviation 'P. O. R.' is the shortened form of 'Patent Office Reports.' If this is so, we must demur to it, for the Reports should not in our opinion be styled 'Patent Office Reports'; they are reports, as the title-page clearly shows, edited by eminent King's Counsel. The issue of Mr. Cutler's Reports is the form which action under section 40 of the Act has taken. So many pages are occupied with statutes, rules, forms, &c., as already mentioned, that attention seems compulsorily to be directed to the Appendix to which they are properly relegated. In this Appendix we find not only all the repealed sections of the Act of 1883 that relate to trade-marks printed in full, but also the Trade Marks Act of 1905, and this in a book upon 'Letters Patent for Inventions.' There are also present the 'Instructions to Applicants for Patents' occupying some seventeen closely printed pages. Since these Instructions, in pamphlet form, are distributed gratuitously by the Patent Office, it is not clear why a book, already big, should thus further be enlarged. Indeed, on the general question, it is always a matter of opinion how far a text-book should reprint acts, rules, &c., which are purchasable for a few pence in other forms. The busy practitioner for whom, for instance, this work is intended would have the official publications ready to hand. He should not again be compelled to purchase them probably at an enhanced price. This reprinting appears to be the more unnecessary when, in addition, all relevant sections and rules *verbatim* accompany the text. As regards the principles which are set out in the book, the salutary practice of looking up the authorities quoted might, here and there, cause

the reader to qualify the views with which he is met. On the question of 'novelty,' the author says, 'It is evident, that, if the alleged new manufacture can be shown to have been in possession of the public before the application for the grant of letters patent, there is no consideration for the grant' (p. 77); and, 'Therefore, the question of whether the invention is new or not is one of fact and depends on the circumstances in every case' (p. 80), a reference being made to *Pickard v. Prescott* ([1892] 9 R. P. C. p. 200). We cannot altogether agree with the author. Whether novelty is present is a question of mixed law and fact, using those words in their usual sense. It is, we think, a question of law as to what constitutes being in 'possession' of an invention. We would refer to *Harris v. Rothwell* ([1887] 4 R. P. C. 225), in which the Court of Appeal was divided on the question of what constituted 'being in possession of the public.' The solution still awaits the House of Lords. In the case of *Pickard v. Prescott* the Lord Chancellor was anxious for his remarks upon the publication of an invention to be taken only in reference to the circumstances of the case before him. We are referred to a case of 1843 for the statement, which for many years has not held good, that 'the title of the specification must disclose the object of the invention' (p. 110). Several decisions before 1852, and bearing upon the results of inconsistency of title and specification, are given; yet, four pages later, we are informed that 'the question of variance between the title and the specification is one upon which the decided cases can have but little bearing.' Of course, as appears on a subsequent page, their value depends upon the fact that for the 'Title' before 1852 we ought now to read 'Provisional Specification,' and utilize this information where disconformity between the provisional specification and the complete specification is alleged. The statement (p. 103) that 'Utility . . . does not depend at all upon the amount of commercial success that may result,' reads strangely against 'Commercial success is strong and almost conclusive evidence of utility, though as pointed out above, [p. 103] its absence is no proof of want of utility' (p. 107). Possibly the qualification that was evidently intended on p. 103 has been inadvertently omitted. The statement (p. 33) that Section 85 'does not abolish trusts, but merely prohibits the registration of trusts,' does not state adequately the result of *Stewart v. Casey*, which is alluded to on p. 224. On p. 194 we are told that under Section 18 'there is power neither to amend the title . . .'; yet in the case of *Arnold's Patent* (Grif. Ad. Pat. Ca. 5) the Attorney-General, under this section, was prepared to allow an amendment of the title after the patent had been sealed.

We, ourselves, consider the use of quotation marks demands a faithful adherence to the words of the passages quoted. Apart from the introduction of italics into quotations where none appear in the originals—a practice of doubtful propriety—there are instances here where the revision must have been more or less perfunctory. For example, on p. 118, we find these words—'short note or minute of that which was ultimately disclosed in the full specification'—put in quotation marks. The report, to which we are referred, says, 'the identity of the invention which is disclosed by the full specification, with that of which a short note or minute was made in the provisional specification.' Dates, too, given to the cases are curious. Sometimes an appended date means the date of the first proceedings in the case, sometimes when the quoted dictum was delivered, and sometimes, if we mistake not, the date of the report, with nothing to inform the reader which is which. On p. 34 an Act is improperly

quoted, and on p. 185 we also notice old rules referred to as though subsisting. On p. 123 it is said that in the case of *Bailey v. Robertson* the specification in question 'was held bad for variance,' whereas a reference to the report, 3 App. Cas. p. 1080, will show that the House of Lords varied the judgment of the lower court, which had found disconformity between the specifications, and remitted the case 'back to the Court of Session in Scotland to do therein as shall be just and consistent with this variation and judgment.' Having seen statements in other text-books similar to this, we suggest that they may be due to a hasty reading of *Bailey v. Robertson* as presented in the Abridgment of Patent Cases by the late Professor Goodeve.

There are also many other topics on which observations suggested by a perusal of the book might be made, if their introduction within the limits of a review were feasible. Current ideas reflected in this work on combinations, claims, invention, mechanical and chemical equivalents, to mention some examples, require to be probed more deeply. This, however, is not the place to enter upon what might turn out to be a lengthy dissertation. In conclusion, we can recommend this work to those who are interested in patent law either as students or practitioners. Moreover to those, in particular, who already possess an older edition, we suggest the substitution of the present improved and modern treatise.

Encyclopaedia of Local Government Law (Exclusive of the Metropolis).

Edited by JOSHUA SCHOLEFIELD. Vol. II: 'Betterment' to 'District Councils.' London: Butterworth & Co., and Shaw & Sons. 1906. La. 8vo. lxxx and 535 pp. (25s. net.)

THIS volume does not disappoint the expectations roused by its predecessor. It contains many admirable short articles on such miscellaneous matters as 'Betterment' (a word which we must reluctantly accept as English), 'Bill-posting,' 'Beating the Bounds,' 'Bribery of Officials,' 'Census,' 'Church ways,' 'Public Clocks,' and 'Destructive Insects.'

There are longer articles on 'Buildings,' 'Burial,' 'By-laws,' 'Commons,' 'Compensation,' 'Contracts,' 'County Councils,' 'The Crown,' 'Disorderly Houses,' and 'District Councils.' Every one of these articles is good in its way; but their ways differ. Thus Mr. Geoffrey Ellis has written well on Contracts of Corporate Bodies, but his style is somewhat diffuse. The Common Law rules may now since *Lawford v. Billericay Rural Council* [1903] 1 K. B. 772, be stated in a few lines, and it seems hardly necessary in a book of this kind to trace out the history of the controversy which was settled by that case. In striking contrast is Mr. Robertson's article on the Crown, which contains an immense amount of highly concentrated matter, somewhat in the form of a digest.

There is also a want of uniformity as regards the extent to which historical matter is introduced. Thus in a short article on the creation of cities, the editor admirably summarizes the origin of cities; whereas an ingenuous reader of 'Charters of Incorporation' might suppose that no borough had ever been incorporated otherwise than by the machinery provided by the Municipal Corporations Act, 1882. So too it is in vain that we search for any description of a County or of its constitution earlier than the Local Government Act, 1888, by which that novelty, the administrative county, was created. The ancient county divisions still exist for some purposes, and do not merit the neglect with which they are treated. Little or no light is thrown on the nature of a 'County at large,' or on

the peculiar constitution of such cities as Gloucester and Bristol, which were for some purposes separate counties long before county-boroughs were invented.

Mr. Hill has a comprehensive article on by-laws. We do not quite appreciate his reasons for suggesting that recent cases have thrown doubts on the old rule that a by-law in restraint of trade is bad. The cases he cites are none of them instances of total restraint of trade. In *Collins v. Corporation of Wells* (1 Times L. R. 328) Lord Coleridge says, 'No doubt a by-law in restraint of trade is bad; but this by-law is only a partial restraint'—a distinction which has been recognized at least since 1721 (*Fazerkerly v. Wiltshire*, 1 Stra. 462); and we know of no case in which a by-law in restraint of trade has been held good.

On the other hand the writer seems to state too generally that there is a power to regulate trade by by-laws. The cases he cites are cases in which the places where trading was regulated by by-laws were of a special character such as the foreshore over which the local authority had special statutory rights, or a market place, where the local authority had power as owners of the market to appropriate parts of the market place to the purposes of particular kinds of trade.

Taken as a whole the articles in this volume attain a high level of accuracy and lucidity, and in the longer articles the orderly and systematic arrangement of the topics is highly praiseworthy.

A Treatise on the Law of Master and Servant. By CHARLES MANLEY SMITH. The Sixth Edition by ERNEST MANLEY SMITH, with Notes on the Canadian Law, by A. C. FORSTER BOULTON, M.P. London: Sweet & Maxwell, Lim.; Toronto: The Carswell Co., Lim. 1906. Royal 8vo. xevi and 823 pp. (30s.)

IN the course of a career of over fifty years Master Manley Smith's work (written by him in his 'leisure hours which the present abnormal condition of his profession has rendered more than usually numerous') has attained to its sixth edition, and it is therefore too late to comment on the general character and scope of the work. As far as the English law of the subject is concerned, the new edition seems to be similar to the last with the necessary additions, particularly the addition to the Appendix of seven recent statutes and one ancient one, which formerly appeared in the body of the work. The *format* of the whole has been made larger and more convenient. As to the general plan of the work we will only make these two observations, first, is it worth while to print a large appendix (some 300 pages) of statutes unless they are fully annotated? If the scope of the work does not admit of such annotation, would it not be better to leave the practitioner to refer to the works which are particularly concerned with such statutes? Secondly, is it worth while to deal in the body of the work with a subject like combinations amongst masters and workmen, if only eight pages can be devoted to it, and, if it is worth while, why is it not equally worth while to deal with the Workmen's Compensation Act, 1897? We notice one or two important recent cases which ought to have been inserted, namely, *Boyle v. Smith* [1906] 1 K. B. 432, and *Tozeland v. West Ham Union* [1906] 1 K. B. 538. These cases, though not then reported in the Law Reports, were decided some time before the date which is appended to the preface to the book, and had been reported elsewhere. A later case than either of these, *Williams v. North's Navigation Collieries* (1889), Lim., in the House of Lords, is duly

referred to in the Index, though not in the body of the work. The important new feature of the present edition is the Canadian law contributed by Mr. Forster Boulton. This, so far as we are competent to judge, seem to be full and accurate, except that it is not altogether up to date. The references to the Supreme Court Reports seem to end with volume 34, somewhere in 1904, though there have been two volumes published since. Neither do we observe any references to the Territories Law Reports. But the addition adds to the value of the book, which still remains a standard work on its subject.

The Law relating to Land Purchase in Ireland. By R. A. WALKER, assisted by E. C. FARRAN. Dublin: Hodges, Figgis & Co., Lim. 1906. xvii and 623 pages. (21s. net.)

THIS, the latest book on the complicated and difficult subject of the law relating to Land Purchase in Ireland, will be found of great assistance by solicitors, landlords, land-agents, and others who have to carry out the operations which transform a tenant into a proprietor under the Land Act of 1903.

The Introduction is full and clear, and states the principles underlying the Land Purchase Acts; it traces the various steps and specifies the different documents required to complete a transaction between landlord and tenant under the Act of 1903, beginning with the 'calculations' by a vendor or purchaser before the bargain, and ending with the final allocation of the purchase money by the Judicial Commissioner after the completion of the contract.

All the statutes and sections of statutes relating to Land Purchase in Ireland are set out in full, and the work thus comprises the entire Land Purchase Code. There are also several forms useful to solicitors, agents, and others, with a list of all authorized investments for the purchase money under the Acts. Extracts from the report of the Estates Commissioners, which further point out the working of the Act, are given with a table showing the average number of years' purchase obtained in the various counties in Ireland. All the rules relating to Land Purchase both in the Court of the Land Judge and in the Land Commission are set out in full.

The notes to the various sections of the Acts of 1903 and 1904 are full and explain clearly and concisely the effect of the sections with which they deal. For instance, the notes to section 13 of the Act of 1903, which deals with the important subjects of sporting rights and minerals, give a summary of the law relating to sporting rights which will be found very instructive; again, the notes to section 17 of the Act, which specifies the persons with whom the Land Commission may deal as owners, are very full and form a summary of the law relating to the powers of married women, infants, and lunatics to sell under the Land Purchase Acts. There is one signal defect in this book, from the point of view of a lawyer called upon to advise on points of law arising upon the construction of the Acts, and that is the omission to refer to all the decided cases under the Acts. Several cases which should have been noticed have been overlooked or perhaps considered unworthy of notice, and other works on the subject of Land Purchase contain many cases which the authors considered material but to which the authors of the present book have omitted to refer. This defect, however, will not interfere with the usefulness of the book to those persons for whom it is primarily intended.

Notable Scottish Trials. The Trial of Dr. Pritchard. Edited by WILLIAM ROUGHHEAD. London: Sweet & Maxwell, Lim. 8vo. 343 pp. (5s. net.)

THE art of advocacy can be learned only by studying it from the life, with ears and eyes intent upon some actual forensic contest. Yet such study may be very profitably supplemented by the perusal of printed reports of famous trials, where the eliciting or the marshalling or the criticizing of the evidence has presented greater difficulties than have to be surmounted in everyday litigation. The publication of the modern series of State Trials has now made several such reports accessible at a cheap price; but many readers will desire to get beyond the narrow range of constitutional law into examples more closely connected with ordinary life. Messrs. Sweet and Maxwell are therefore doing well in undertaking the issue of a series of carefully prepared reports of important Scottish trials; and we shall be glad if its success should warrant them in extending their plan to England and Ireland.

The volume before us tells the story of a crime of forty years ago which taught insurance offices how easy it is for a medical man to make away with inmates of his own household. Pritchard's two victims were his wife and his mother-in-law; and they met their death whilst the one was undergoing medical treatment at his hands, and the other was engaged in nursing her. The peculiar atrocity of his conduct was heightened by the fact that there existed no serious motive for either murder. He had the skill and the callousness to protract the poisoning of his wife through several months, with such slowness as to give her illness all the appearance of being natural. Hence he would probably have escaped detection had he not complicated matters by also poisoning her mother, and doing it less gradually. The cynical hypocrisy of the physician who, whilst apparently amiable and even affectionate, could thus do to death under his own roof two women of his own family, presents to the student of human nature a striking ethical problem.

But the interest of this trial is not merely ethical; both the bar and the bench gave useful lessons in the course of it. Inglis, who in Madeleine Smith's case had exhibited extraordinary skill as a prisoner's counsel, showed in trying Pritchard his powers as a judge. The law-student will find the ever-present question of the evidentiary value of motive discussed from three points of view (pp. 231, 243, 288). He will see how an able advocate, when unable to dispute the fact that crime has been committed, may approach (pp. 252, 262) the delicate task of suggesting the possible guilt of another person who has had the same opportunities as the prisoner whom he is defending. And in view of the conflicts which medical men, both in England and in France, have recently found may still arise between the obligations of professional secrecy and the denunciatory duties of a citizen, it is important to notice the emphatic language of the Lord Justice-Clerk Inglis. When he found that a physician had suspected that poisoning was going on and yet had held his tongue, he reminded him (p. 283) that 'there is a rule of life far higher than professional etiquette—a duty that every right-minded man owes to his neighbour—to prevent the destruction of human life.'

The editor of the volume has done his work energetically; not contenting himself with reproducing the best report he could find, but collating it with others. He has even taken the trouble of inducing some distinguished witnesses 'to revise the evidence given by them at the

trial'; but the editors of the future volumes of the series will be well advised if they avoid the excessive zeal which set this rather dangerous precedent. He has done better service by writing an excellent introductory narrative, which summarizes the whole story very clearly. And he has added several useful appendices; as well as various pictures, the usefulness of some of which may be questioned. It is important that books of this class should be differentiated as markedly as possible from literature of the type of the 'penny dreadfuls'; and one step in this direction is to keep them free from any undignified engravings that have no value except to gratify a curiosity that is morbid or at best puerile.

We have also received:—

A History of English Legal Institutions. By A. T. CARTER. Third Edition. London: Butterworth & Co. 1906. 8vo. viii and 304 pp.—This book has been much improved since its first appearance, and in the third edition may be recommended as an excellent general introduction to the history of English Courts, their jurisdictions and their process. Students ought to be grateful to Mr. Carter for giving them clear information on the rather outlying matters which were formerly difficult to find in any one place, such as the exceptional position of clerics and Jews in the Middle Ages. In a future edition Mr. Carter will perhaps be induced to go a little out of his way for the reader's convenience, and, having got the Jews out of England, add a few sentences to explain when and how they came back. No criticism in detail occurs to us except the very slight one that in one or two places the style of 'Queen's Bench Division' has by inadvertence remained unaltered. We should like to see a few more specific references to the original authorities for the benefit of apt learners.

The Law of Corporate Executors and Trustees. By ERNEST KING ALLEN. London: Stevens & Sons, Lim. 1906. 8vo. xv and 93 pp.—This is an interesting little volume, written because, as the author states in his preface, 'no text-book at present exists upon the subject, nor has any writer so far devoted attention to it.' The law relating to corporation-trustees or trustee-companies has not, in fact, yet become sufficiently prominent or important in England to require special treatment; this is one of the points in which the British dominions beyond the seas have rather taken the lead. Strange to say Mr. Allen has not drawn upon Colonial cases or statutes for analogies which might well 'serve to construct authority.' If the next edition is to be written for the use of lawyers, a different method of citing cases should be adopted.

The Spirit of our Laws. London: Sweet & Maxwell, Lim. Toronto: The Carswell Co., Lim. 1906. 8vo. xi and 299 pp. (5s. net.)—'The author believes that it is the only book in English which endeavours to describe in popular language for laymen the whole fabric of our legal institutions.' We think the statement would be made more exact by reading 'practice' for 'institutions'; but, subject to that amendment, we think the author has not only made a laudable endeavour of which the difficulty can be realized only by those who have attempted something of the same kind themselves, and has made it in the right way, but has been to a great extent successful. We are not sure that his expressed desire to be useful to law

students and justices of the peace has not led him to admit a greater proportion of technicality than most intelligent laymen will care for; they are not bound, however, to read all the quotations. In substance the exposition appears to be sound and accurate. If we must find something to criticize, we do not like the application of the word 'authority' to the works of living writers on the law.

Dante as a Jurist. By JAMES WILLIAMS. Oxford: B. H. Blackwell. London: Simpkin, Marshall, Hamilton, Kent & Co. 1906. 8vo. Four leaves unnumbered and 72 pp.—A learned and pleasing monograph, in which Dr. Williams not only enumerates the legal passages and allusions in Dante's great poem, and the names of the lawyers and legislators whose various fates are described, but analyses the argument of the *De Monarchia*, a book which has comparatively few readers but is most interesting to students of medieval thought. Dr. Williams is far too good a scholar to maintain any paradoxical thesis, or to see a miracle in the fact that Dante, being an exceptionally studious and accomplished layman, knew a good deal of law. In the late thirteenth and early fourteenth century it would have been strange if such a layman, in Italy of all countries, had known less. The legal point of view, however, is rare among Dante commentators and will be novel to most readers even if they are lawyers, and the learned writer appears to have left no relevant source of information unexamined. One unlucky misprint makes him say in the note on p. 4 that with Virgil 'justice [i.e. injustice] was a contempt of heaven.' As a rule, considering the number of Latin quotations and foreign words, the printing is creditable.

Self-governing Colonies: a lecture delivered before the Tasmania University Union on May 1st, 1906. By D. G. McDougall, Professor of Law and Modern History in the University of Tasmania. Hobart, Tasmania: J. Walch & Sons. 1906. 8vo. 22 pp.—This interesting tract comes only just in time for notice. Mr. McDougall's conclusion is 'that Great Britain and her self-governing colonies form a group of independent kingdoms under a common ruler—the tie of common allegiance being further cemented by a defensive but not necessarily offensive alliance. But the alliance at present existing depends on understandings only, and it is rapidly becoming a serious question whether these should not be transmuted into clear, written, hard and fast conditions.' It seems to us that the first thing is to secure full information and effective discussion of matters touching the common interest; at present the states of the British Empire have not adequate means of communication and co-operation. When that is done we shall be better able to see whether written covenants are wanted, or peradventure the future constitution of the Empire, like the present one of the United Kingdom, may be better founded on understandings ripened into custom than on any formulated rules.

Journal of the Society of Comparative Legislation. Edited for the Society by Sir JOHN MACDONELL, C.B. and EDWARD MANSON. New Series. No. XV. London: John Murray. 1906. (5s. net).—This number contains A Biographical Notice (with portrait) of Justice Brewer of the Supreme Court, U.S., by R. Newton Crane, and articles on 'Imperial Conference—or Council?' by Sir Thomas Raleigh, K.C.S.I.; 'Corps de Droit Ottoman,' by Sir Roland Wilson, Bart.; The Passport System, by N. W. Sibley; Roman-Dutch Law, by Frederic Mackarness, M.P.; Divorce and Public Order in Italy, by Torquato C. Giannini; Law and Taxation in Northern Nigeria, by Albert Gray, K.C.; a Review of Legislation, 1904, and some twenty pages of notes.

The Law of Aliens and Naturalization, including the text of the Aliens Act, 1905. By H. S. Q. HENRIQUES. London: Butterworth & Co. 1906. La. 8vo. xviii, 230, and 12 pp.—This treatise contains an admirable exposition of the history and present state of the law as to the rights and disabilities of aliens, as to naturalization and denization, and as to the legal position of naturalized subjects; the operation of the Aliens Act, 1905, is also fully described. The book is written in a very attractive and readable style, and will be found useful by persons interested in the political aspects of the questions which it discusses, as well as by practical lawyers.

Traité de la Location des Coffres-Forts. Par M. JULES VALÉRY. Paris: Albert Fontemoing. 1905. 8vo. 151 pp.—This book discusses—from the point of view of French law—the nature and effect of the agreement usually entered upon between a Safe Deposit Company or a similar establishment and a customer who hires a safe remaining in the custody of such establishment, but of which the key is delivered to the hirer.

Kelly's Draftsman, containing a Collection of Concise Precedents and Forms in Conveyancing. Fifth Edition. By LEONARD H. WEST and S. B. SCOTT. London: Butterworth & Co. 1906. 8vo. xxiii, 640 and 30 pp. (15s.)—The Preface states that this edition has been brought up to date by the embodiment of the alterations made by the Land Transfer Rules of December, 1903, and by the addition of new Forms and Notes, while some Forms given in previous editions are now omitted. Practitioners will find in this work a number of useful miscellaneous precedents, many of them not accessible elsewhere.

The Law Association of Philadelphia: addresses delivered March 13, 1902, and papers prepared or republished to commemorate the centennial celebration of the Law Association of Philadelphia, Pennsylvania. Philadelphia [1906]. La. 8vo. vii and 462 pp. [Many portraits.]—This book is carefully, indeed beautifully produced, and gives pleasing glimpses of Pennsylvanian life in the colonial and early revolutionary days. Its interest is too local and personal to admit of detailed review in a journal occupied with the science of the law in general; nor would it be easy to find a competent reviewer on this side of the Atlantic.

The Overseer's Handbook . . . By WILLIAM W. MACKENZIE and HENRY J. COMYNS. Sixth Edition. London: Shaw & Son; Butterworth & Co. 1906. 8vo. xxxi, 502 and 113 pp. (5s. net.)—This is a cheap and comprehensive guide to the duties of overseers, rate-collectors and other parish officers. Several chapters in this edition have been re-written, and the work is generally brought up to date.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, K.C. Tenth Edition. Oxford: at the Clarendon Press; London and New York: Henry Frowde. 1906. 8vo. xxv and 443 pp. (10s. 6d.)

The Law of Banking, with an Appendix on the Law of Stock Exchange Transactions. By HEBER HART. Second Edition. London: Stevens & Sons, Lim. 1906. La. 8vo. cviii and 1119 pp. (30s.)—Review will follow.

The Agricultural Holdings Acts, 1883–1890, with Explanatory Notes and General Forms. By AUBREY JOHN SPENCER. Third Edition. London: Stevens & Sons, Lim. 1906. 8vo. xix and 180 pp. (7s. 6d. net.)

Tudor's Charitable Trusts. Fourth Edition. By L. S. BRISTOWE, a Judge of the High Court of the Transvaal, CECIL A. HUNT and HALFORD G. BURDETT. London: Sweet & Maxwell, Lim. La. 8vo. lxxiv and 1339 pp. (£2 5s. net.)—Review will follow.

Manual of Licensing Applications. By DAVID LIVESEY. London: Butterworth & Co.; Shaw & Sons. 1906. 8vo. xiii and 114 pp.

A Practical Guide to the Death Duties and to the Preparation of Death Duty Accounts. By CHARLES BEATTY. London: Effingham Wilson. 1906. 8vo. xii and 170 pp. (4s. net.)

The Practitioner's Guide to the duties of Executors and Administrators. Third Edition. Revised and corrected by J. F. C. BENNETT and E. J. EADES. London: Waterlow, Bros., and Layton, Lim. 1906. La. 8vo. xxxv, 367 and cccxlii pp. (15s. net.)

The Trade Marks Act, 1905, with notes, cross-references, and a commentary, and the Rules, Forms, &c. By D. M. KERLY and F. G. UNDERHAY. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xv and 255 pp. (6s. net.)

The Outlines of Evidence and Procedure in an action in the King's Bench Division. For the use of Students. By A. M. WILSHERE. London: Sweet & Maxwell, Lim. 1906. 8vo. xvi and 167 pp. (6s.)

A Guide to Criminal Law and Procedure, intended for the use of Students for the Bar Final and for the Solicitors' Final Examinations. By CHARLES THWAITES. Seventh Edition. London: George Barber. 1906. 8vo. xii and 208 pp. (10s.)

Rates and Taxes: a Practical Guide. By E. M. KONSTAM. London: Butterworth & Co. 1906. 8vo. xxiv, 168 and 42 pp. (5s. net.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS, J. G. PEASE, and A. B. CANE. Vol. LXXXII. 1848-1850. (7 Hare; 9 Common Bench; 5 Exchequer; 7 Dowling & Lowndes; 1 and 2 Bail Court Reports.) London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1906. La. 8vo. xv and 988 pp.

Best's Principles of Evidence. Tenth Edition. By J. M. LELY. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xxvi and 623 pp. (25s.)—Review will follow.

The Institutes of Justinian, translated into English with an index, by J. B. MOYLE, D.C.L. Fourth Edition. Oxford: at the Clarendon Press. 1906. 8vo. viii and 220 pp.

*The Editor cannot undertake the return or safe custody of MSS.
sent to him without previous communication.*

His address is 13 Old Square, Lincoln's Inn, not Oxford.

THE LAW QUARTERLY REVIEW.

No. LXXXVIII. October, 1906.

NOTES.

THE LATE PROFESSOR LANGDELL.

IN common with our American brethren we deplore the loss of Prof. Christopher Columbus Langdell, who died at Cambridge, Mass., on the 6th of July, at the age of eighty. We take the following account of his work and method from an article signed by Prof. Wambaugh of Harvard in the *New York Nation* of July 12:—

‘It was not until 1870, when he had reached the age of forty-four, that he found his great opportunity. In that year he became Dane Professor of Law and Dean of the Law Faculty of Harvard University; and from that time until now there has been a Langdell system of study, and to describe or attack or defend that system has been one of the most frequent undertakings of law students and of law teachers. For a generation, no professor’s name has been more widely known. Lately the discussions have been less heated, and perhaps less numerous than formerly; but even now the question most often and most pressingly asked as to any law school is whether it uses the Langdell system. Professor Langdell himself spent no time in disputation. He simply devised the system, used it, and was content to let results test the correctness of his theory.

‘To introduce a new system of study at the Harvard Law School in 1870 was an act of great bravery. The school had been in existence for half a century. It was in great repute. Its professors had produced treatises which had held, and still hold, a high place in the esteem of the profession. Even laymen have heard of the works of Story, Greenleaf, Parsons and Washburn. Their productions have been largely the fruit of class-room lectures. By the method of instruction then current the student listened to lectures and read treatises; and in order that the task might not be merely the memorizing of generalizations made by the lecturer

or the text-writer, some instructors devoted much time to discussing concrete problems. Many men are still living who know that the work of those old days must not be treated disrespectfully; but Professor Langdell, though trained in the method then current, was of opinion that he knew a method more scientific, more thorough, and better fitted to produce successful lawyers. He knew—as, indeed, every law student learns in the first week of his studies—that the existence and limits of a rule of law must be proved finally, not by a textbook, but by the reported decisions of courts. He knew that when a lawyer had occasion to test a rule of law he searches for those decisions. Professor Langdell determined that the student should be trained to use those original authorities, and to derive from judicial decisions, by criticism and comparison, the general propositions which text-writers, if they do their work conscientiously, find in the same manner; that, in other words, the student should not be fed with predigested food. The plan as worked out, was that the instructor should reprint from the reports the cases adapted to show the growth of legal doctrine; that the student should master five or six cases in preparation for each class-room exercise; and that the exercise should consist of stating and discussing these cases and solving related hypothetical problems. However easy it may be to-day to see that this plan is reasonable, in 1870 it appeared to many persons, and indeed to most, impracticable and unscientific. The fact seems to be that this was an extremely early attempt to apply the inductive method of the laboratory to matters foreign to the natural sciences. To Professor Langdell it seemed the most natural plan possible. He had devised part of it in his own student days. He understood himself to be simply applying to the student's stage of the lawyer's life the method established from time immemorial as to the work of the practitioner and the judge. On the title of his first collection of cases, he tied himself to the past by quoting words written by Coke two centuries earlier: "It is ever good to rely upon the book at large, for many times *compendia sunt dispendia*, and *melius est petere fontes quam sectari rivulos*."

'After Professor Langdell began the new plan, to persevere with it required further courage; for the majority of students, teachers, and practitioners showed only too clearly that they considered it foolish and almost sacrilegious to lay aside old methods and the time-honoured treatises. Many years passed before the new system was adopted unanimously by Professor Langdell's colleagues.

'Meanwhile the Harvard Law School was bitterly attacked upon the supposition that this was the only method used; and in consequence the attendance remained nearly stationary, being

saved from serious diminution by nothing but the increase in the attendance upon Harvard College, and in the resort of Harvard graduates to the law school.

'About 1890 there came a great change. Almost simultaneously the Harvard Law School began to grow and the Langdell system began to spread to other universities. To-day Professor Langdell's triumph is complete. Time has demonstrated that persons trained under his system are sound and successful lawyers. That system is now the only one employed at Harvard. Most of the other law schools use it, wholly or partly, or some modification of it; and those which cling to old methods find it advisable to insert in their announcements argumentative matter to the effect that they combine with the old methods some features of the method discovered by Professor Langdell. The law schools employing the new system, wholly or partly, in its unmodified form, are distributed widely; and leaving out of the account States in which there are no law schools at all, one might have traced for Professor Langdell a triumphal progress from the Atlantic to the Pacific, passing exclusively through States in which at least one law school professedly uses his system.'

The Editor of this REVIEW had the opportunity of saying something about Langdell in his own place in 1895 (L. Q. R. xi. 326; 'The Expansion of the Common Law,' p. 6). He will not attempt to speak of Langdell as a man, for the acquaintance, though very pleasant, was interrupted by long intervals, and too brief when it recurred. Nothing has happened to alter his opinion that Langdell's genius for the pure logic of the Common Law was unique or almost unique in our time. In the last years of Langdell's life the same keen analytical power was applied to the leading conceptions of equitable jurisdiction (L. Q. R. xxi. 434). The little book on Equity Pleading published many years earlier is still not much known among English lawyers, but it goes to the root of the matter far more thoroughly than any other modern treatise known to us, though probably there is no other so short.

It is perhaps necessary to say here, though in America it is now superfluous, that the Harvard Law School under Prof. Langdell's system has produced not mere theoretical students, but lawyers well equipped for practice: so well that the leading legal firms of the Eastern States—if not of more remote ones—have actually been competing for their services for ten years and more. Meanwhile the majority of the English Bar, or at any rate of those in authority, continues, it seems, to believe that law cannot be taught at all. The Law Society thinks otherwise.

F. P.

At the end of *Watts v. Stevens* [1906] 2 K. B. at p. 339, will be found a note on the pagination of Blackstone's Commentaries. It was much condensed by reason of the small space available, and some of our readers may like to have a little more detail.

The marginal pagination by which Blackstone's Commentaries have been referred to for more than a century was introduced in the 12th ed., 1793, the first with Christian's notes. The Advertisement, vol. i, p. ix, states that 'the pages of the former editions are preserved in the margin.' Now this statement is incorrect. The publishers of 1793 preserved, in fact, the paging of the 10th ed., 1787, which corresponds nearly but not quite with that of the 9th ed. (the first with editorial notes, by Burn), 1783; this 9th ed. is not to be found in the Inns of Court or the Law Society's library, but has been verified in the British Museum copy. There are considerable variations between the 9th and 10th editions in the third volume; elsewhere the discrepancy is only slight and occasional. Again, the 9th ed. does not reproduce the paging of the editions published in Blackstone's lifetime. Those editions appear to have been uniform in paging notwithstanding the change from quarto to octavo form, so that the dislocation of the original numbering must have been due to the insertion of additional footnotes, as in like manner further increase of the notes accounts for the variance between the 9th and the 10th editions. The actual paging of the 12th and later editions need not be considered.

It appears on the whole, then, that owners of any edition of the Commentaries earlier than the tenth cannot safely use their copies for the purpose of making references.

We desire to add that the Keeper of the Printed Books in the British Museum, on the request of the Editor of the Law Reports, a request made, of course, wholly as a matter of favour and not of right, was so good as to procure a much better collation of the ninth edition than any one not specially accustomed to bibliographical work would have made for himself.

Not much inconvenience can arise at this day from the singular carelessness of the publishers of 1793, as the great majority of the copies of Blackstone in working use must be of later date. But it was worth while to establish the facts.

F. P.

In these days, when the wealth of the world is so largely represented by stock and share certificates, it is of the utmost importance that people should be able to place implicit trust in such documents of title. Hence the long line of authorities establishing the doctrine of estoppel by certificate against companies. But forgery puts

a different complexion on the matter. In *Ruben v. The Great Fingall Consolidated*, 75 L. J. K. B. 843, H. L., affirming [1904] 2 K. B. 712, 73 L. J. K. B. 872, the transaction was a *fabula acta* from beginning to end—a fraudulent scheme on the part of the company's secretary to serve his private ends. The shares purporting to be transferred had no existence, the transfer was forged, the company's seal was fraudulently affixed to the certificate, the names of the directors on the certificate were forged. To have made the company liable in such a case for the fraud of its secretary—a fraud of which the company and its directors were absolutely innocent—would have been carrying the doctrine of estoppel to quite unreasonable lengths. That doctrine presupposes a representation made by the person sought to be charged or by his agent duly authorized. Such a person says—to use Lord Blackburn's words—'I take upon myself to say such and such things do exist and that you may act upon the basis that they do exist, and if the other man does really act upon that basis it is of the very essence of justice that between those two parties their rights should be regulated not by the real state of facts but by that conventional state of facts which the two parties agree to make the basis of their action.' All this might have applied in the *Great Fingall* case had the fraudulent secretary had authority to make representations on behalf of the company. The fallacy of the argument for the appellant lay in assuming that because the secretary had authority to deliver the share certificate, he had authority to warrant its genuineness.

To have held the company liable in such a case would have created a general danger much more serious than the particular grievance of the defrauded stockbroker: it would place companies at the mercy of an unscrupulous secretary.

When a company has once, under its articles, delegated the management of its affairs to a board of directors, it cannot resume control of those affairs at the pleasure of a mere majority. This is the moral of *The Automatic Self-cleansing Filter Syndicate Co., Ltd. v. Cuninghame* [1906] 2 Ch. 34, 75 L. J. Ch. 437, C. A., and a very instructive and salutary moral it is. Articles are the act of the whole body of shareholders, and where they nominate certain persons to be directors, with full powers to manage the affairs of the company, that is tantamount to a mutual agreement by all the shareholders that the control of the company shall, so long as the directors remain in office, be vested in such directors, and that their discretion shall not be interfered with. If the company is dissatisfied with the directors' management, if it wishes to remove them and resume

the control of its affairs, it must do so in the manner provided by the articles. In the *Automatic Self-cleansing Filter* case the situation was this: one large shareholder and his friends, holding together a majority of the shares of the company, quarrelled with the policy of the directors; they wanted the directors to sell the undertaking of the company to a new company; the directors thought the proposed sale improvident, and refused to carry it out. The shareholders' majority was not strong enough to remove the directors, which required a special resolution, but though with only 1502 votes against 1198 they claimed by virtue of this mere majority to set aside the judgment of the directors in a matter of management delegated to them by the whole body of the shareholders. It would be most unreasonable that a narrow majority like this should overrule not only the directors but the dissentient minority of shareholders unless the articles, as representing the mutual agreement of all the shareholders, sanction such a right. A company's articles are with its memorandum the constitution of the company, and it is not without good reason that any alterations in such articles can only be made by a special resolution, that is with the sanction of a two-thirds majority of the whole of the shareholders. Directors are there not to do the bidding of one party or another among the shareholders, but to hold the scales evenly between them in the general interests of the company.

The jerry builder clearly existed in the days of good Queen Anne, what time the once fashionable quarter of Soho was a-building, and his shoddy building materials wrought upon by the time and weather of two centuries supplied Warrington J. with an interesting problem in *Torrens v. Walker* [1906] 2 Ch. 166, 75 L. J. Ch. 645. Since the ruling of Tindal C. J. in *Gutteridge v. Munday*, 7 C. & P. 129, 132, 48 R. R. 773, it has been familiar law that where a very old building is demised and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term or of greater value than it was at the commencement of the term. All the lessee undertakes in such a case is, in Cave J.'s words, to 'patch the thing up so long as it is, in the nature of things, right and reasonable that the thing should be patched up.' But there is a limit to this patching up process—even the 'wonderful one horse shay' succumbed at last, 'by time subdued, what will not time subdue?' and the decayed old Queen Anne house had fallen upon the same fate. The bricks were crumbling, the mortar perished, the walls broken and bulging. Was the lessor, under these circumstances, compellable practically to rebuild under a covenant that

he would 'at all times during the said term keep the outside of the demised premises in good and substantial repair'? No! said Warrington J., a lessee would not—it would be unreasonable—then neither should a lessor. There is no difference in principle. 'If the lessee is not bound to give back to the lessor at the end of the term a different thing from that which was demised to him, neither in my judgment is the lessor bound, by a similar covenant, to give to the lessee during the term a different thing from that which the lessee took from him at the beginning of his tenancy.' But is this view of the analogy quite sound? The covenant is construed in favour of a lessee because of the hardship which rebuilding would entail on him if nine-tenths of his expenditure went, as it would do, to benefit his lessor. In the case of a covenant by a lessor, it is all the other way, nine-tenths of the expenditure goes to benefit the lessor himself.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE YEAR BOOKS.

II.

THE objection has often been urged, and justly urged, against a system of case law, that the true bearings of the decision cannot be understood without some knowledge of the system of procedure and pleading which prevailed when the case was decided. This objection applies with the greater force as we go further back in our legal history; and therefore it applies most forcibly to the Year Books. It would not perhaps be too much to say that to lawyers who know only our modern reports the Year Books are hardly intelligible. The reports therein contained appear in many cases to be merely reports of desultory conversations between judge and counsel, which often terminate without reaching a distinct issue either of fact or law. Even when a distinct issue of fact or law is reached they often tell us nothing of the final result. Much of their inconclusive character is due, no doubt, to their informal shape. Notes taken by apprentices during the hearing of the facts of cases at which they happened to be present will naturally possess such characteristics; and when these notes are copied, and perhaps freely edited, such characteristics will be emphasized. But it is our want of knowledge of the legal environment in which they were produced which is the chief cause of their obscurity. There are vast differences between the mediaeval and the modern conception of a trial and all the ideas involved in the notion of a trial. Differences upon matters so fundamental will explain why familiar rules of law appear in the Year Books in unfamiliar guise. They appear there bound up with the intricate manœuvres made possible to a learned profession by an intricate procedure. We who live in a state of society far remote from that of the thirteenth century miss much of the reason which such intricacies may have had to the society in which they grew up; and reports intelligible to men living in that society and practising that system are not intelligible to us. The earlier Year Books, too, are, as we have seen, often only the notebooks of the apprentice, and, as every student knows, nobody else's notes can be as valuable as they are to the maker. At the same time it is only by the help of these notes, which grow fuller as time goes on, that we can accustom ourselves to the atmosphere of the mediaeval law-court, and to the mind of the mediaeval lawyer. Unless we can do this we shall never attain to any

real knowledge of the spirit of the mediaeval common law; and a knowledge of the mediaeval common law is essential if we are to attempt a critical estimate of the work of the lawyers of the sixteenth and seventeenth centuries, who adapted its rules to the new needs and ideas of the modern state. Let us see, then, how far a consideration of certain differences between the mediaeval and the modern in such vital matters as the rules of process and the rules of pleading will place us at the right point of view from which to look at the Year Books.

1. We must remember that when the Year Books begin the law is only just emerging from that primitive stage in which the securing of the appearance of the defendant is a difficult problem; and that it is still in that stage in which the difficulties of travel make process slow¹. Rules based upon primitive legal ideas, and upon physical necessities of an older age, became the permanent basis of an elaborate superstructure of technical rules. The rules of law upon this subject had become fixed before they had had time to become rational. It followed that with every increase in the complexity of the law these fixed rules became less rational and a greater hindrance to justice. Every action possessed its special machinery and its special formulæ for working that machinery². A lawyer who wished to do his duty by his client must be at home with all the capacities of that machinery, in order that he might know at each stage of the case what chances were open³. Many a good case might be lost, or a bad case won, or, at least a decision upon it delayed, if the right step was taken at the right time, or if prompt advantage were taken of an unskilful move or a verbal error. It would be both tedious and useless to go into details about the process used to get a defendant before the court, and the various forms of process which might issue in the course of a case, or after it had been decided. In a real action the process to get the defendant before the court consisted, when 'reduced to its lowest terms,' of summons, seizure of the land into the king's hand, and finally judgment, that the land be handed over to the demandant. Even then it was open to the tenant to reopen the whole dispute by means of a writ of right⁴. It would be in very few cases that process could thus be reduced to its lowest terms.

¹ P. & M. ii. 589, 590.

² *Articuli ad Novas Narrationes* (Tottel's ed. 1561), ff. 77 b, 78: 'Igitur in omni casu primo opus est videre ac intellegere casum. Casusque bene notato et intellecto, tunc impetrare breve iuxta casum, et deinde super breve bene narrare secundum naturam actionis in forma superius recitata. Quia ubi non habetur bonum et certum breve, quod est omnium actionum fundamentum et originale, impossibile est manutenere bonum placitum, neque facere narrationem congruam, iuxta naturam brevis super quo narraturus est.'

³ Below, p. 371, n. 6.

⁴ P. & M. ii. 590, 591.

The validity of the summons might be questioned¹. Both the tenant and the demandant might cast many essoins—how many depended upon the kind of action brought. If there were several tenants they might at one time have delayed the proceedings almost indefinitely by essoining themselves alternately². In many cases the hearing of the case might be hung up by claiming a view of the premises; and we find much litigation upon the right to have a view³. Then there might be vouching to warranty or aid prayer⁴, and the person vouched or prayed in aid might wish to essoin himself. Protections must be reckoned with which would put the case without a day⁵. Infants might intervene and claim their age; and this would mean that the proceedings would be stayed till the infant had attained his majority⁶. All these various processes involved many writs and orders to the sheriff; and if the sheriff had taken the wrong steps to carry out the process, or if he had made any verbal fault in his returns, there was fresh material for disputes which delayed the hearing of the case⁷. Booth tells us that the proceeding by the Grand Assize is very dilatory, and may become 'vexatious to the Tenant by the Practice of the Demandant by not prosecuting and suing out Process as he ought, and many other Delays for want of Knights, there not appearing, or the like⁸.' Process in the case of personal actions was almost if not quite as lengthy; but there were not all the opportunities for delay in the course of the case which were afforded by some of the real actions. The number of essoins allowed were not so numerous⁹. There could be no vouching to warranty. But in the older personal actions the process was lengthy and ineffectual enough. There might be protections; and it was always possible to question the acts of the sheriff. One of the reasons for the spread of trespass was that, being a penal action, the process was comparatively speedy and effective. It was possible to arrest the defendant, and in the last resort to outlaw him. The plaintiff was not left, as in

¹ a. g. Y. B. i, 2 Ed. II (S. S.), 19.

² 3 Ed. I, c. 43; 6 Ed. I, st. i, c. 10; Reeves, H. E. L. ii. 36, 37.

³ a. g. Y. B. 2, 3 Ed. II (S. S.), 141; early Roman civil procedure seems to have recognized something like the view, Greenidge, *Civil Procedure in Cicero's Time*, 55, 56.

⁴ Reeves, H. E. L. ii. 632.

⁵ e. g. Y. B. 12, 13 Ed. III (R. S.) 316—a case which shows that this was so even when there were several defendants, and the protection was cast for one only; Reeves, H. E. L. ii. 615.

⁶ For a hard case of this kind, see Y. B. i, 2 Ed. II (S. S.), 150.

⁷ See a. g. Rot. Parl. iii. 594 (7, 8 Hy. IV, no. 112), justice was delayed because the judges were 'en divers opinions et ambiguities' owing to the fact that on the panel a juror's name was Congrove, while in the writs of Habeas Corpus and Distringas he was called Gongrove.

⁸ Real Actions 115, and the case there cited; cp. *ibid.* 157 for similar remarks as to process upon the writ of Formedon.

⁹ Reeves, H. E. L. ii. 93.

some of the older personal actions, without any other remedy than to keep distraining a contumacious defendant, who very likely had nothing by which he could be distrained¹. We must not forget that the ingenious means by which the three Common Law Courts encroached upon one another's jurisdiction were merely perversions of their ordinary process which added to the technicalities of an already complicated system². Even in Edward I's reign it was possible for the judges themselves to make mistakes. 'How is it,' said Berewick to the sheriff, 'that you have attached these people without warrant; for every suit is commenced by finding pledges, and you have attached although he did not find pledges?' &c. 'Sir,' said the sheriff, 'it was by your own orders.' 'If it had not been so,' notes the reporter, 'the sheriff would have been grievously amerced, *et ideo cave*.' In Henry VI's reign Fortescue C. J. was being pressed by the absurdity of a distinction which he was laying down as to when a writ of *Scire facias* would, and when it would not, issue against a person who has possession of the goods of one attainted. All he could reply was, 'Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason⁴.' When a judge of Fortescue's eminence is obliged to confess that he cannot explain the reason for a given procedural rule, and is reduced to infer its reasonableness from *a priori* views as to the inherent reasonableness of the law, we may be sure that the rule is coming to be an antique incumbrance. In fact the rules as to process were the least reasonable part of the mediaeval common law. It is upon them that we must place a large share of the blame which attaches to the common law of the fifteenth century for its failure to keep the peace, and to punish wrongdoing. Their intricacy served the purpose of the unscrupulous⁵. It is not until much of this complicated process has gone out of use, with the decay of the real actions, that the common law will be able to take new life. But in the period of the Year Books the land law and the law of the real actions were the principal part of the common law. Therefore there are necessarily many cases in the Year Books taken up solely with elucidating the difficulties of process in

¹ P. & M. ii. 591-3; Reeves, H. E. L. i. 452-6.

² Holdsworth, H. E. L. i. 87-9, 105, 106.

³ Y. B. 30, 31 Ed. I (R. S.), 258.

⁴ Y. B. 36 Hy. VI, pl. 21 (pp. 25, 26): 'Sir la Ley est come j'ay dit et ad este tout dits puis la Ley fuit commence, et nous avons plusors courses et forms qui sont tenus pour Ley, et ont este tenus et uses per cause de reason, nient obstant que modo le reson ne soit prest en memory.'

⁵ 'The law servyth of nought allys in these days,' ran Cade's proclamation in 1450, 'but for to do wrong, for nothyng is sped almost but false maters by colour of the law for mede drede and favour.'—Three Fifteenth Century Chronicles (C. S.), 96.

these and other actions. These cases are naturally not very intelligible to us. The changes which made this learning obsolete rendered useless whole groups of cases reported in the Year Books.

2. The rules of pleading—the mode in which and the conditions under which the parties state the case which is to be tried—go far to determine the shape of many rules of law; and they obviously have a great influence upon the form which the report takes. In old days the defendant must meet a plaintiff who has properly stated his case with a full denial¹. Though this rule was long preserved it had become possible in Bracton's day for a defendant, after making this full denial, to use divers 'exceptions,' and for the plaintiff to reply to these 'exceptions².' But in his day these rules were confused. It is not till Edward I's reign that we can see the beginnings of that peculiarly English branch of law—the science of pleading. The peculiarities of this science cannot better be described than in the words of Stephen³ :—

'The object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an issue. And this appears to be peculiar to that system. . . . In all courts indeed the particular subject for decision must of course be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law. By the general course of all other judicatures the parties are allowed to make their statements at large . . . and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary before the court can proceed to decision to review, collect, and consider the opposed effect of the different statements, when completed on either side—to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause—and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary means to the preparation and adjustment of his *proofs*; and is also afterwards virtually effected by the judge in the discharge of his general duty of *decision*; while in some other styles of proceeding the course is different—the point for decision being selected from the pleadings by an act of the court or its officer; and judicially promulgated prior to the proof or trial. The common law of England differs from both methods by obliging the parties to come to issue; that is, to plead or to develop some question (or issue) *by the effect of their own allegations* and to *agree upon this question as the fact for decision* in the cause; thus rendering unnecessary any

¹ P. & M. ii. 605.

² P. & M. ii. 605-12.

³ Pleading (5th ed.), 137, 138.

retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy.

The question which the legal historian must answer is the question why the English mode of pleading was so different from that which we find in other systems of law. The answer will probably be found in the peculiarity of the old conception of a trial, and in the mode in which that old conception of a trial was adapted to the jury system.

The old conception of a trial was very different from our modern conception. The pleadings of the parties led up to some one of many modes of proof which might be either selected by the parties or adjudged by the Court¹. How those modes of proof worked it was impossible to inquire. All the legal interest of the case was centred in the questions which led up to the award of proof². And all those questions were subject to the fixed rules of the game which bound the judge as strictly as the parties; for it is a characteristic of these old procedural rules that the suitor is considered as having a legal right to their enforcement as against the court, and, therefore, a grievance against the court if they are not applied or misapplied³. The jury became almost the only mode of proof at a time when these old ideas of a trial were still prevalent; and consequently the jury was regarded as settling the matter in the same final and inscrutable manner as compurgation, battle, or ordeal⁴. Therefore just as in the older law all the legal interest in the case turned upon what we should now regard as preliminary matters, such as the rules of process for getting the parties before the court, and the rules which defined the modes in which they should state their case when they were before the court. Just as in the older law all these rules must be put in motion and strictly obeyed by the parties at their own risk, so now the parties must put in motion the complicated machinery of process, and define by their own pleadings with painful and literal accuracy the issue to be tried⁵. Thus we get that which Stephen tells us is the

¹ P. & M. ii. 599-600; Thayer, Evidence, 9, 10; Holdsworth, H. E. L. i. 136, 137.

² See e. g. Bracton's Note Book, case 1115.

³ P. & M. ii. 663-5; cp. Holdsworth, H. E. L. i. 296 for a survival of this idea in the Channel Islands; for a similar idea in Roman Law, see Sohm, Institutes (tr. G. Ledlie), ed. 1892, 153. Greenidge, Legal Procedure in Cicero's Time, 84, speaking of the civil law formulae, says: 'Nor is it at all likely that these civil "formulae" were preceded by any ruling in law, by any promise of an action, or in fact by anything of the nature of an edict. For the praetor could not promise where he could not refuse, and the ruling was not his, but that of the *iudex civilis*. So far the praetor professes to be only an exponent of something beyond and behind him.'

⁴ Holdsworth, H. E. L. i. 155, 156.

⁵ For an analogy in Roman Law cp. Girard, 952: 'Il (le magistrat) donne simplement par son concours une sorte d'authenticité indispensable aux actes des parties spécialement à ceux du demandeur . . . son rôle est un rôle d'assistant sinon pure-

characteristic feature of the English system of pleading—the settlement of the issue to be tried by the allegations of the parties.

But though the jury took the place of the older modes of proof, though the process and the pleading of an older age were adapted to the proof by jury, the growing elaboration of the law, and the differences between the test of the jury and the test of such proofs as ordeal or battle, begin a series of changes which eventually substitutes for the old system of proof the modern idea of a trial based upon the pleadings of the parties.

In the first place the jury were never expected to pass upon matters of law. It was open then to find a special verdict and ask for the judgment of the court thereon¹. It soon became clear that there were some issues which were purely issues of law. Thus we get a distinction between issues of fact and law which was foreign to a primitive procedure in which the assertion of the plaintiff was met by a denial of the defendant, and followed by an award of proof². In the second place it had become impossible to state a case fairly to the court, unless the parties were allowed to use many pleas (exceptiones, replicationes, triplicationes) of different kinds. It is true that the old ideas survived so far that a defendant must generally preface his defence by a denial; but after that he could urge any other pleas he liked. The rules about the pleading of these matters were at first confused. The pleas were long, argumentative, and double. But one important result followed from the new facilities allowed to the parties in the statement of their case. Many of the old formal words required to be spoken with literal accuracy by plaintiff and defendant gradually disappeared. In particular, the formal defence became merely a collection of words of court—formal words concealed in the record by an ' &c., ' the meaning of which has departed³. The new learning as to exceptions threw the old rules into confusion⁴. If Bracton had been followed by a generation or two of judges, bound by their orders to know something of the civil and canon law, the jury might have come to be regarded merely as witnesses, and not as a body to which the parties have agreed to refer the

ment passif au moins un à peu près mécanique'; Greenidge, *Legal Procedure in Cicero's Time*, 84.

¹ See e. g. Y. B. 3 Ed. II (S. S.), 187.

² P. & M. ii. 627, 628.

³ Y. B. 20, 21 Ed. I (R. S.), 280, Louther said *arguendo*, 'Every word spoken in court is not to be taken literally; they are only *paroles de la court*'; 3 Ed. II (S. S.), 35, 167; Y. B. 17, 18 Ed. III (R. S.), 584, Shardelowe says, 'Many matters are counted by way of form which are not traversable'; P. & M. ii. 606; cp. the gradual disuse of the formal words of the *Legis Actio*; Cicero, *Pro Mur.* 11, 25 (cited Greenidge, *Legal Procedure in Cicero's Time*, 163, n. 1), says: '*Primum dignitas in tam tenui scientia non potest esse. Res enim sunt parvae, prope in singulis literis atque interpunctionibus verborum occupatae. Deinde, etiamsi quid apud maiores nostros fuit in isto studio admirationis, id enuntiatis vestris mysteriis totum est contemptum et abiectum.*'

⁴ P. & M. ii. 609.

determination of the issue; and English law would then, like continental systems of law, have adopted a procedure based upon the procedure of the civil and canon law¹. But this was not to be. The newer ideas of pleading, drawn in the first instance from the Roman law, and necessitated by the growing complexity of the common law, were reduced to order, and given a shape which was peculiarly English, because it was determined by the peculiarly English use of the jury as a mode of proof. We have seen that the jury was put into the place of the older modes of proof with as little change as possible, and that the fundamental peculiarity of the English system of pleading—the settlement by the debate of the parties in court of the issue to be tried—was due to the survival of the older ideas as to a trial. For the same reason and in the same way the shape which these new rules as to pleading took was coloured, in the first place by some of the old ideas as to pleading which led up to the older methods of proof; and in the second place by the necessity for adapting the new ideas as to pleading to the requirements of the jury system. (1) Both the older and the newer modes of pleading were oral; and many of the fundamental rules of the common-law system of pleading were made and adapted to this system of oral pleading. ‘The abandonment of the practice of oral pleading,’ says Stephen², ‘led to no departure from the ancient style of allegation. The pleading has ever since continued to be framed upon the old principles and to pursue the same forms as when it was merely oral. The parties are made to come to issue exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the justices of former times prescribed to the actual disputants before them are as far as possible still enforced’ with respect to the later written pleadings. (2) The facts at issue were submitted to the jury as to one of the older modes of proof. But the new modes of pleading had made it possible for the parties to bring before the court complicated states of fact; and it was obvious that issues could not be placed before a reasonable body of men in the same manner as they were submitted to the decision of the older arbitrary tests. These two considerations are at the bottom of the requirements, which underlie all the rules of pleading, that the statements of the parties shall be material to the issue, single, and certain. The need for distinguishing between issues of fact and law, the need (occasionally) for distinguishing cases in which trial by jury was applicable from cases in which it was not³, the need for

¹ P. & M. ii. 623, 655, 656.

² Pleading, 29.

³ See *The King v. Cooke* (1824) 2 B. & C. 871 for a curious survival of this reason for certainty in pleading.

ascertaining the venue from which the jury must come, the need for placing the point at issue in an intelligible form before the judge and jury, are at the bottom of these fundamental rules of pleading. Thus the problems which originated in the adaptation of the newer ideas as to pleading to the old conception of proof, and the problems which originated in the fact that the proof was now, not an arbitrary test, but the finding of a body of reasonable men, are the factors which determined the fundamental rules of the common-law system of pleading.

This system of oral pleading in Court leading to an issue which is submitted to the jury, as if the jury were the test or proof to which the parties have agreed to submit, affects the whole character of the reports in the Year Books. It was the oral pleading leading to the issue which interested the reporter. In the course of this debate many questions of law—material to the issue and immaterial—were mooted and discussed by Bench and Bar. What view the jury took of the issue of fact so formulated was of comparatively little interest to the legal profession, unless it was made the basis of further proceedings. Decisions upon an issue of law were no doubt interesting to the profession; but cases which involved such decisions were often adjourned, and the decision was, perhaps, never given. The judges, Professor Maitland tells us¹, were unwilling to decide nice points of law; 'too often when an interesting question has been raised and discussed, the record shows us that it is raised and then tells us no more. A day is given to the parties to hear their judgment. A blank space for the judgment is left upon the roll, and blank it remains after the lapse of six centuries.' Even if judgment were given, it might well be that the reporter did not happen to be in court on that day². In the meantime the report of the debate which led to the distinct formulation of the issue contained much sound learning and showed where the doubt lay. And so it is these arguments leading to the formulation of the issue which comprise the largest part of the cases reported in the earlier Year Books. Naturally as the argument proceeded new facts were elicited, old facts assumed new aspects, new legal points were suggested, all of which were taken down by the reporter, and edited and annotated for the benefit of himself and his friends. The Year Book, therefore, does not give us a report directed to establish some particular point. Rather, it gives us an account of the discussion which preceded the formulation by the parties and the Court of that

¹ Y. B. 3 Ed. II (S. S.), lxxi, and 69.

² Cp. above, p. 284, n. 10; Y. B. 3 Ed. II (S. S.), 197, information seems to have been supplied to the reporter by the clerk.

point; and the matters discussed may bear very little relation to the issue reached¹. Sometimes no issue is reached². We are reminded of what must have taken place before the Praetor *in iure* when he was engaged, with the help of the parties and their counsel, in settling the formula. If we had some contemporary account of what took place before the Praetor, it would probably resemble the report in the Year Book far more closely than the report in the Year Book resembles the modern report of the arguments and the judgments upon an issue already determined by the pleadings of the parties³.

We may note, too, that in a report of this oral debate which preceded the formulation of the issue, the line between argument and decision will tend to become obliterated. Serjeants or apprentices present, but not engaged in the case, intervene with their advice⁴; and what they say is naturally interesting to the profession. A judge even will condescend to give a little lecture for the benefit of the student⁵. Naturally reports which record such proceedings will be discursive and conversational. In some of our older reports the reasons given by the judges for their formal decision are styled arguments. These Year Books are really the reports of arguments—arguments used by the Bar and the Bench. It was the argument rather than the final decision which interested the profession, partly because there was then no such rigid theory as to the binding force of decided cases as that to which we are accustomed, partly because the discussion and the elucidation of legal principles were to be found in the argument rather than in the dry formal decision, and partly because decisions upon points of law were often not given, or, if given, were difficult of collection by the private reporter.

It is clear that this fashion of oral pleading made for great freedom in the statement of the case. A painful accuracy was no doubt required in the wording of the writ, in the correspondence between writ and count, and in the observance of the elaborate rules of process. But when all objections to the writ and process had been disposed of, when the parties were fairly before the court, the debate between the opposing counsel, carried on subject to the advice or the rulings of the judge, allowed the parties considerable latitude in pleading to the issue. Suggested pleas will appear after

¹ Y. B. 3 Ed. II (S. S.), 31-6, 97, 116-8.

² Ibid. 16.

³ For some account of this, see Greenidge, *Legal Procedure in Cicero's Time*, 179-81.

⁴ Y. BB. 21, 22 Ed. I (R. S.), 148, 242; 33-5 Ed. I (R. S.), 476.

⁵ Y. B. 36 Hy. VI, pl. 21, p. 26, Fortescue sums up the points of the case for the benefit of the apprentices, serjeants, and others of his company; Y. B. 3 Ed. II (S. S.), 36, Bereford C.J. says to Westcote, 'Really I am much obliged to you for your challenge, and that for the sake of the young men here, and not for the sake of us who sit upon the bench. All the same you should answer over.'

a little discussion to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled¹. In fact, in the earlier part of this period it was not the strictness of the rules of pleading which hindered justice, it was rather the strictness and elaboration of the rules of process. This looseness in the rules of pleading was increased, perhaps almost necessitated, by the fact that the law of evidence, as we understand it, hardly as yet existed. So far are we from the rule of later law that evidence must not be pleaded, that we might almost say that oral evidence was generally brought to the notice of the court by pleading it². One or two illustrations (1) of the freedom of action allowed to counsel under this system of pleading, and (2) of the manner in which evidence was brought before the Court, will illustrate these causes for the differences between the Year Books and the later reports.

(1) Illustrations of the mode in which an issue was reached by discussion at the Bar under the superintendence of the Court will be found on almost every page of the Year Books. As a simple illustration we will take a case of the year 1309³. 'Alice brought her writ of entry *sur disseisin* against a Prior, and counted on her own seisin as of fee and of right in time of peace, saying, "Into which the Prior has no entry save after (*post*) the disseisin which one G. did to Alice." *Passeley*: "She was never seised of fee and of right in such wise that she could be disseised." *Stanton J.*: "That is no good answer in this writ, but it would be a good answer to say that G. did not disseise her." *Friskenev* argued that *Passeley's* answer was receivable because, if the plaintiff's count claiming as of fee and of right were accepted by them, they might be estopped in any subsequent proceedings from denying that she held as of fee and of right. *Stanton J.*: "What you say is wrong. What enrolment are we to have in this case? I think it should be, 'not so seised that she could be disseised,' so your averment is not receivable." *Passeley*: "The enrolment shall be, 'not so seised in such manner as she demands so that she could be disseised.'" To this all agreed.' The Court will sometimes suggest a plea to meet difficulties suggested by counsel in argument⁴; and the fact that the Court advised a particular mode of pleading was once stated as a reason why

¹ Y. B. 3 Ed. II (S. S.), lxvi-lxviii.

² Thayer, Evidence, 114, 115.

³ Y. B. 2, 3 Ed. II (S. S.), 136, 137.

⁴ Y. B. 18 Ed. III (R. S.), 152, *Sharshalle J.*: 'For that matter I should hold him to be a foolish pleader if he pleaded to the demandant's action within the liberty, but he would say that he ought not to answer there because the tenements are outside the liberty, and upon that he ought to abide judgment, whereupon, if judgment were rendered against him, he would have the Assize.'

counsel adopted it¹. But sometimes the Court is only wise after the event, and delivers a lecture upon what, in its opinion, would have been the proper mode of pleading². Counsel once argued that what a party has pleaded and passed over without notice by the Court is wholly immaterial; and though the Court denied the proposition as thus broadly stated, there was probably a considerable element of truth in it³. A survival of the old idea that a pleader's words were not binding till avowed by his client no doubt made it the more possible to treat pleas as capable of amendment till one was reached by which counsel would abide⁴. Whether or not this was so it is quite clear, as Reeves says⁵, that everything advanced by counsel was, in the first instance, 'treated as matter only *in fieri* which upon discussion and consideration might be amended, or wholly abandoned, and then other matter resorted to, till at length the counsel felt himself on such grounds as he could trust. Where he finally rested his cause, that was the plea which was entered upon the roll, and abided the judgment of an inquest or of the Court, according as it was a point of law or fact.' We may note, too, that the complications of process sometimes gave to a pleader a chance of correcting an error which might otherwise have proved fatal. If the case were put without a day by a Protection, or, perhaps, by a default, the pleading must begin anew; and mistakes made on the occasion of the first pleading could then be amended⁶.

¹ Y. B. 11, 12 Ed. III (R. S.), 88, *Trewith*, after some pleading, seeing that the Court was against the writ, demanded that it should abate. 'You shall not get to that,' said *Parnis*; 'you have pleaded higher, and thereby affirmed the writ as good.' 'I vouch the record of the roll,' said *Trewith*, 'that it was not of my own accord, but by the advice of the Court.'

² Y. B. 14 Ed. III (R. S.), 60, 'Scrope was on the bench and said: "What you say as to two bastards you say well, but, in God's name, you might have saved yourself against her by way of replication . . . and this replication must have been entered on the roll."'

³ Y. B. 11, 12 Ed. III (R. S.), 42, *Trewith*, 'Whatever thing a party may plead and pass over without regard of the Court and join issue on a plea, then nothing shall be recorded except the issue; for of that which was spoken and pleaded before and waived without award, nothing shall be entered on the roll'; Hillary J., 'You say wrong'; Y. B. 3 Ed. II (S. S.), 129, Bereford C.J., 'You did not demur there. So you cannot take advantage of that.'

⁴ Y. B. 3 Ed. II (S. S.), 129, and *Intro.* lxvi, lxvii.

⁵ H. E. L. ii. 223.

⁶ Y. B. 3 Hy. VI, Pasch. pl. 10, *Formedon* against *J* and *A* his wife; the demandant counted against them on a gift in tail made by deed to the ancestor of the demandant. Paston by mistake said by virtue of which the donor was seised, whereas he should have said *donee*; the husband made default then and at the petite cape; the wife prayed to be received to defend her title, and relied on the faulty count. Paston offered to plead anew, and he and Martin argued that this could be done; *Babington contra*; *Cokain* agreed with Paston and Martin, putting the case of a protection and a resummons, 'Mettons que apres le count le parol uste este mis sans jour per protection, et ore le demandant ust sue resummons envers le tenant, ne duiet le demandant or count de novel? jec dis que si pur ceo que parol serra my sans jour pur ceo fuit le premier count alle et determine: et en resummons il serra pris sicome nul count ust jamais, et sicome il n'est jamais eu nul auter

(2) The law knew the preappointed witness to deeds or charters: it knew also the written evidence of the deeds or charters themselves. It did not as yet recognize the independent witness called to testify to the facts of which he had knowledge; indeed, as Thayer has shown, the strictness with which the laws against maintenance were interpreted effectually discouraged him¹. The evidence, which in modern times is given by such witnesses, was at this period supplied partly by the jury, which the law was careful to draw from the neighbourhood of the occurrence², partly by the custom of pleading such evidence. For this reason questions turning upon the 'venue' of the jury are of much importance in the Year Books; and for the same reason counsel deem themselves to be in a manner responsible for the statements which they make to the Court. They examine their clients before they put forward a plea³. They even decline to plead a fact as to the truth of which they have doubts⁴. Sometimes, indeed, we see a distinction taken between the plea and the evidence for the plea when it is convenient to say that a statement is only evidence and not really a plea⁵. But, as a general rule, it would be true to say that such distinct things as the pleadings, the statements of counsel, and the evidence for those statements are hardly distinguished in the Year Books⁶. To this state of things must be ascribed some peculiar doctrines in the law of pleading. It was clearly difficult under these circumstances to bring to the notice of the jury, who knew something of the facts, the exact import of similar yet legally distinct states of fact, especially having regard to the rule that, if the special facts really only amounted to the general issue, the general issue only could be pleaded, and the case therefore necessarily left to the jury. It was equally difficult to separate clearly matters of fact from questions of law under a system in which the evidence for the facts stated in the pleadings, and the arguments of counsel were all involved in the pleadings themselves, and only extricated gradually in the course of the discussion which settled the issue to be tried. To these difficulties are due the doctrine of colour in pleading⁷,

breve devant eyant regard al count; Sic hic'; cp. Y. B. 5 Hy. VII, Trin. pl. 4—this shows how conceivably rules of process might be used to save the consequences of an otherwise fatal error.

¹ Thayer, Evidence, 125-9.

² Holdsworth, H. E. L. i. 155, n. 9.

³ Y. B. 14 Ed. III (R. S.), 248.

⁴ Y. B. 38 Hy. VI, Pasch. pl. 13.

⁵ Y. B. 14, 15 Ed. III (R. S.), 346.

⁶ See Longo Quinto, 58, cited Thayer, Evidence, 133, 134.

⁷ For this doctrine, see Thayer, Evidence, 118, 119; Reeves, H. E. L. ii. 629-32. 'Suppose,' says Reeves, 'A enfeoffed B of land, and an assize was brought by a stranger against B, B could not plead these facts simply, as such plea would amount only to the general issue; he would be obliged to plead the general issue, and the case would be left to the jury. He, therefore, by a wholly fictitious averment, gave the plaintiff colour, i. e. a prima facie cause of action. Thus, after pleading that A had enfeoffed him, he would further plead, "that the plaintiff claiming by colour of

and the demurrer to evidence¹. Both these doctrines were due to a desire to withdraw the case from the jury and to submit it to the Court, in cases in which it was thought desirable to have a clear decision upon the legal consequences of certain states of fact. The older modes of proof necessarily gave a 'general verdict'; and it was equally possible for the jury, which had stepped into their place, to return a general verdict. Under a system which prevented the judge from clearly directing the jury as to the points of law involved in the case, the growing complexity of the law made it very dangerous to allow the jury to return such a verdict. Therefore these methods were devised for ousting the jury, and for getting a point of law decided by the Court. Both these doctrines lived on in the law long after their original *raison d'être* had disappeared. Neither can be understood, unless we understand the peculiar difficulties involved in the conduct of a case in court according to the procedure recognized in the fourteenth and fifteenth centuries.

Towards the close of this period this system of oral pleading began to be superseded by the system of written pleadings, which, when complete, were entered on the record. The practice in its final form is thus described by Stephen²:—'The present practice is to draw them (the pleadings) up in the first instance on paper, and the attornies of the opposite parties mutually deliver them to each other out of court . . . these *paper pleadings* at a subsequent period are entered on record.' This change, it may be said, is merely a mechanical change; but, as Maine has noted³, in reference to another change of a similarly mechanical character—registration of title—the effect of such a change on the fabric of the law may be considerable. Perhaps it was the more considerable because it was accompanied by another change, of even greater importance. It was just about this period that the practice of calling witnesses to testify to the jury was becoming common, and was giving birth to our modern law of evidence⁴. The pleading which defines the issue begins to separate itself from the explanatory statements

a deed of feoffment made by the said feoffor, before the feoffment made to the said tenant (by which deed no right passed) entered, upon whom the said tenant entered," this left a point of law for the Court, i. e. the validity of the alleged first deed, and thus the case was withdrawn from the jury'; see Y. B. 3 Ed. II (S. S.), 156.

¹ This is explained by Eyre C.J., delivering the opinion of the judges to the House of Lords, in *Gibson and Johnson v. Hunter* (1793) Dougl. 187, at p. 206: 'If the party wishes to withdraw from the jury the application of the law to the fact, and all consideration of what the law is upon the fact, he then demurs in law upon the evidence, and the precise operation of that demurrer is to take from the jury, and to refer to the judge, the application of the law to the fact.'

² Pleading, 27, 28.

³ Early Law and Custom, 357.

⁴ Holdsworth, H. E. L. i. 159, 160.

of counsel and their arguments upon points of law on the one side, and from the sworn evidence for the facts pleaded or stated on the other. These changes had considerable effects upon the jury, the court, the legal profession, the law report, and the law. In the first place, we shall say something of the manner in which these changes were effected, and in the second place, we shall summarize their results.

As to the date at which and the stages by which the practice of pleading by means of paper pleadings were introduced, we know very little. Gilbert thought that they began to be introduced in the reign of Richard II¹; but, as Reeves points out, there is very little foundation for this conjecture². It is probable, however, that the growth of technicality and formalism in pleading may have introduced some changes, so gradual that they were hardly noticed, in the mode bringing the pleadings of the parties before the Court. That the rules of pleading were becoming formal and fixed is clear from the number of cases in the Year Books of Henry VI and Edward IV's reigns which turned simply upon matters of form³. In one case it is reported that the judges were reluctant to depart from a precedent laid down in the *Novae Narrationes*, though apart from this precedent they would have come to another conclusion⁴. It appears, too, from this case, that they sometimes consulted the prothonotaries as to the proper form of plea; and no doubt a form of plea which was sanctioned after such consultation would easily harden into a fixed rule⁵. Before a plea was entered on the roll there is sometimes a friendly discussion as to its form; and then the opposing counsel promises an answer on the following day⁶. As to the exact mode of entering such pleadings on the roll, there was probably no very fixed practice. In a case of Henry VI's reign three prothonotaries of the Common Bench summoned to give evidence on this point all differed. The Court apparently considered that the pleadings should be entered day by day as the case proceeded⁷. This makes it the more probable that the conclusion which Reeves⁸ arrived at, after the study of the Year Books of this period, is correct.

¹ Gilbert, *Origins of the King's Bench* (ed. 1763), 315.

² H. E. L. ii. 398, 399.

³ H. E. L. ii. 619-53; at p. 620, he says: 'Almost everything substantial in pleading . . . was settled by judicial determination in the reigns of these kings.'

⁴ Y. B. 39 Hy. VI, Mich. pl. 43.

⁵ Longo Quinto, p. 22; for another case, see *ibid.* p. 23, and Y. B. 33 Hy. VI, Mich. pl. 40; for cases in which the clerks either ask or give advice in matters of process or pleading, cp. Y. BB. 11, 12 Ed. III (R. S.), 426, 434; 13, 14 Ed. III (R. S.), 258, 310; 14, 15 Ed. III (R. S.), 74—rule noted as contrary to the opinion of the clerks.

⁶ Longo Quinto, 35.

⁷ Y. B. 39 Hy. VI, Mich. pl. 32.

⁸ H. E. L. ii. 621, 622; cp. Y. B. 16 Ed. III (R. S.), i, 64: 'And note that after the adjournment the roll was amended on the prayer of the tenant, when the

'Whether it (the declaration) was drawn out . . . on paper or parchment by the party's counsel, and delivered over to the adversary's counsel, or, what is more probable, was entered, in the first instance, upon the roll of the Court, it is not easy to determine with precision: in point of effect it would be the same; for the roll might be amended by leave of the justices, during the term in which the declaration or plea was entered, and it must, at any rate, be entered on the roll, as of that term; in both of which cases the roll became afterwards, in construction of law, a record: so that the power the justices exercised over the roll during the term is, on the one hand, sufficient to show the possibility of making the amendment of pleas without resorting to the supposition of there being paper pleadings; and the different construction the judges put upon the same roll of parchment, after and during the term, satisfies us that to constitute a record, there was not required a transcript from any less solemn paper or parchment to one that was more so. . . . It seems, therefore, a reasonable conjecture that whenever pleadings *ore tenus* went out of use, it became the practice for the counsel to enter the declaration or plea upon the roll in the office of the prothonotary; that the Counsel of the other party had access to it; in order to concert his plea or to take his exceptions to it; and that when these were to be argued, the roll was brought into court, as the only evidence of the pleading to be referred to. This course was certainly attended with some difficulties, and led to the expedient of putting the pleadings into paper, and handing this paper from one party to the other, the entry on the roll being deferred till the end of the term.'

But this further change to a system of paper pleadings was not well established, Reeves thinks, till the reign of Elizabeth. During the whole of the mediaeval period the pleadings were usually pleaded by the serjeants or apprentices, and sometimes by the litigant in person at the Bar. They may have been enrolled as the case proceeded; and the copy of the roll may have been available to the pleader on the opposite side¹. But subject to this modification, which was no doubt caused by the growing complexity of the rules of pleading, the issue was settled in the old way. It is probable that we must look to the development of the law of evidence for the causes of the change to the later system of paper pleadings interchanged between the parties or their attorneys.

In the Year Book of 38 Henry VI we have perhaps the first and certainly an early mention of a 'paper' pleading². The tenant

demandant had gone with his day, because the justices recorded that the roll did not accord with the plea.'

¹ Cp. Y. B. 21 Ed. IV, Mich. pl. 4 (p. 43): 'Lendemain le plaignif en breve d'Error vient in propre person et pleda ce plee en le forme ensuant "ye have here, &c."—en Anglois [then follows the Latin entry on the roll giving the effect of the plea], A autre jour Catesby monstra tout le plee que il ad plede n'est pas bon.'

² Y. B. 38 Hy. VI, Pasch. pl. 13.

and his attorney in a writ of right had made default at *nisi prius*. The judges had recorded this default, and discharged the jury. In the Easter term the tenant came to the Bar, and his presence was recorded. Thereon Billing and Laicon, counsel for the defendant, prayed judgment against the tenant. Choke and Littleton were counsel for the tenant; and the tenant requested them to plead the fact that while coming to the former trial he and his attorney had been stopped by floods, in order that by this plea his former default might be saved. But these floods were alleged to have been in the county Palatine of Durham and another county; and the serjeants knowing nothing of the matter, and apparently suspecting the truth of these statements, declined to plead them.

'Wherefore the tenant went to Comberford, the prothonotary, and prayed him to make him a paper upon this matter, which he did; then he came with the paper to Choke at the Bar, and prayed him to put it in to the Court, and he did so by his command without pleading it, or seeing what was in the paper; and the paper remained with Copley, another prothonotary, because he had the entry of the matter before¹.'

Billing and Laicon then moved for judgment, commenting upon the character of a plea so suspicious that even the tenant's own counsel would not plead it. Choke and Littleton then tried to excuse the tenant; but Prisot C.J. said to them:—

'You will get no worship by meddling with these false and suspicious matters; for this and such like business will get no favour here. It is not the practice to put in such papers when the party is represented by counsel without pleading them at the Bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead can be said to be suspicious. Then he said to them, if you wish to plead this matter plead it, or otherwise it will be good for nothing. And they replied that they dared not plead this matter, knowing nothing of it except what the tenant told them; and they said that they did not wish to meddle any further with it².'

¹ 'Pourquoi il ala a Comberford protonotary et pria que il voille faire a luy papier de ceo matter; que fait issint; et puis il vint ove le papier et la prist a Choke a le barre, et luy pria a getter ceo en le Court, et issint il fist per son commandement sans pleder ou sans voier que fuit deins le papier, et cest papier, demour ove Copley un auter protonotary pur ceo que il avoit l'entree de le matter a devant.'

² 'Prisot dit a eux. N'auras unques worship per tiels matters, issint faux et suspicious, car ceo matter n'aura nul favour icy, ne nul tiel; et il n'ad este use cy a mettre eins tiels papiers quand le party ad Conseil ove luy sans eux pleder al barre overtement; car si cest point serra suffre nous aurons plusors tiels papier en temps avenir, que viendra eins desous un cloak, et il puit estre dit suspicious matter que son Conseil ne veut pleder. Purquoi il dit a eux, si voules pleder cest matter, pledez, ou autrement il servira pur rien. Et ils respondent qu'ils n'osent pleder, ne ils ne savent unques de le matter, mais come il avait dit; et disoient qu'ils ne voillent plus mesler ove ceo.'

There was then some further discussion, and Moile J. gave it as his opinion that since the serjeants would not plead for the tenant, the tenant could do nothing else but go to the prothonotary and get a paper drawn up and plead the matter in this way¹. After further discussion on other days, it was finally settled 'that the plea be recorded in the manner and form in which it is drawn without any amendment; and they charged the prothonotary to make no amendment,' and then Billing and Laicon were told to answer to the plea. They demurred to it; and after some further discussion the Court told Choke and Littleton to argue the demurrer.

It is clear from this curious tale that persons not represented by counsel could get their pleas put into shape and written out on paper by the prothonotary or his clerk; and that he could then put this paper in as his plea. The Court does not consider it necessary to speak the plea for such a person, as under the old practice². It is also fairly obvious that, when the plea was put in or spoken, it might be amended before it was enrolled, for a special instruction is given that this extremely suspicious plea is not to be amended. We may also note that it is the party or his attorney, and not serjeant, who is identified with these paper pleadings; and we shall remember that Stephen, talking of the settled practice of later days, tells us that it is the attorneys of the parties who deliver these pleadings to one another. But for our purpose perhaps the most important point to note is the fact that as yet the serjeant who pleads a plea takes upon himself some responsibility for its accuracy. Though Moile thought there was no objection to such a manner of pleading when counsel had declined to plead, Prisot objected on the ground that it would be a bad precedent to allow persons represented by counsel to thus put in paper pleas.

In the course of the sixteenth century the practice of proving by witnesses the facts stated in the pleadings was growing³. A very cursory inspection of Plowden's reports will show this. It may be that here, as in other cases, the competition of the Chancery exercised a liberalizing influence upon the doctrines of the Common Law Courts. Persons whose witnesses were frightened by the prospect of proceedings for maintenance applied to the Chancellor for a subpoena directed to these witnesses. The witnesses, being thus compelled to testify, ran no risk of proceedings being taken against

¹ 'Quand le party fuit icy, et son presence record, et command a pleder, et il vient ove sa matter a son Consail et ils ne voillent pleder le matter pur le suspecion, que poit il donques faire, mes va al' protonotary et fait un papier et le mist eins pur son excuse, n'ad il donques bien fait?'

² Y. B. 11, 12 Ed. III (R. S.), 66: 'And because the plaintiff was a poor man, and the Court itself had spoken the declaration, the defendant was driven to answer.'

³ Holdsworth, H. E. L. i. 160.

them¹. A statute of 1563 allowed process to issue to compel the attendance of such witnesses²; and Sir Thomas Smith regards their presence as the usual accompaniment of a trial³. This clearly tends to shift away from counsel the responsibility for the truth of pleas pleaded by him, and to take away Prisot's objection to such paper pleas being put forward by persons represented by counsel; this being so, it would appear that even according to the view of Prisot, and certainly according to the view of Moile, there could be no objection to paper pleadings. We are not, therefore, surprised to find that in the later Year Books of Henry VII and VIII's reign the questions argued are rather questions as to the form and effect of pleadings already settled, than questions as to the form which the issue shall take; and we can say the same thing of the earlier cases in Dyer's reports. This clearly points to the growth of the practice of settling the pleadings out of court⁴. When Sir Thomas Smith wrote, pleadings could be either written or spoken⁵; and in 1584 the serjeants in *Dowman's case*⁶ treat the distinction between the pleadings and the evidence for the pleadings as well settled. In fact the growing complexity of the science of pleading was making it a very special subject, to be learned best in the office of the prothonotaries⁷. Their clerks were employed by the attorneys to draw up the pleadings⁸, and often themselves acted as attorneys for the parties⁹. At the same time the conduct of the

¹ *Slavern v. Bouynton*, Cal. i, xix, petition to the Chancellor for a subpoena to the witness, 'for the cause that he shuld noight be haldyn parcial in the same matier'; cp. *Select Cases in Chancery* (S. S.), No. 126.

² 5 Eliz. c. 9, § 6.

³ *De Republica*, Bk. 2, c. 18.

⁴ In the *Praxis Utriusque Banci* (ed. 1674), 28, an order of Prisot C.J. and the other judges of the C. B. of Trin. 35 Hy. VI is cited as to the fees of the prothonotaries; for every 'comen declaracyon, comen Plee on barre, comen replycacyon, and comen rejoinder in Plees personel,' whether the defendant appear in person or by attorney the sum is 13s. 4d.; for personal pleas pleaded by a serjeant 2s. Does this show that the prothonotaries drew ordinary common form pleadings at this date? Smith, *Republic*, Bk. 2, cc. 1 and 14, talks of the prothonotaries settling the pleadings.

⁵ Bk. 2, c. 12, he tells us that the judges 'heare the pleading of all matters which do come before them: and in civill matters where the pleading is for money, or land, or possession, part by writing, and part by declaration and alteration of the advocates the one with the other, it doth so procede before them till it do come to the issue which the Latines do call *statum causae*.'

⁶ 9 Co. Rep. 9 b.

⁷ Dyer C.J. (*Praxis*, &c. 42), in his charge in 1567 to a jury of attorneys appointed to inquire into misdemeanours in his court, says that he had himself acted as such a clerk.

⁸ *Praxis*, &c. 40, Orders of the judges of the C. B. Mich., 15 Eliz. No. 10, to the effect that no prothonotary's clerk who is an attorney is to draw up 'any paper or book of the office' wherein he is a clerk, in a case in which there is special pleading, and in which he is the attorney of the plaintiff or defendant, unless the other side consent. See *Rot. Parl.* iii. 306 (16 Rich. II, No. 28), for a complaint of abuses arising from this practice; *ibid.* 642 (11 Hy. IV, No. 63), a petition that no prothonotary or filacier of either bench shall be an attorney is declined; and *cp. ibid.* 666 (13 Hy. IV, No. 49).

⁹ *Praxis*, &c. 113, Orders of Hill. 8, Car. I, separated the office of clerk to the prothonotaries and the attorney. The former were to draw the pleadings; the latter

case in court was becoming a very different thing, and demanded very different qualities now that there were witnesses to be examined and cross-examined. The skilful construction of pleadings became a branch of legal learning distinct from the actual laying of the proofs for the pleadings before the Court, and the maintenance of their validity in court. The art of the special pleader falls apart from the art of the advocate¹. The attorney who is brought into close contact with his client collects the facts and the proofs; either he or the special pleader puts them into shape, according to the minute and technical rules of pleading; the serjeant or the apprentice conducts the case raised by the pleadings through the Court, maintaining their validity, attempting to prove by his witnesses or documents the issues of fact, and arguing the issues of law².

In describing these changes we have gone beyond the period of the Year Books. Neither the changes nor their effects were fully felt till well on into the sixteenth century. We shall here only briefly indicate their effects in order that we may be the better able to appreciate the differences between the mediaeval and the modern law and law report.

(1) These changes affected the jury. When the pleadings were drawn up and the issue fixed before the parties came into court, when the evidence was given after the jury had been summoned, it is clear that the character of the jury will change from that of witnesses to that of judges of the facts³. When this change has taken place the importance of drawing the jury from the locality of the disputed occurrence will be lessened. Thus many cases turning upon disputes as to venue which we find in the Year Books become obsolete. (2) They affected the Court. The practice of summoning witnesses to testify to the Court was the direct cause of the growth of our modern law of evidence, and of the growth of new modes of controlling the jury suited to the jury's new position of judges of fact⁴. (3) They probably affected the legal profession. They introduced a distinction between those who prepared the pleadings and settled the issue and those who conducted the case in court. It was in the sixteenth century that the Inns of Court began to insist upon the exclusion of attor-

prosecuted and defended actions for clients. We may note that the clerks were to serve six years in the office, and belong to an Inn of Chancery. Did this lead to the rise of the separate class of special pleaders?

¹ Smith, Republic, Bk. 2, c. 18, assumes that the trial is distinct from the pleadings; in fact the trial as he describes has all the modern incidents.

² Smith, *ibid.*, Bk. 2, c. 1, puts into one class the judges, serjeants, and counsellors, in another the prothonotaries, the attorneys, and solicitors; Greenidge, Legal Procedure in Cicero's Time, 148, tells us that at Rome the pleaders (*advocati*) tended to fall apart from the eloquent *patroni*.

³ Holdsworth, H. E. L. i. 160, 161.

⁴ *Ibid.* 165, 166.

neys¹. It may be that the new division of duties which these changes introduced helped to accentuate an existing division in the legal profession. The old distinction between the narrator and the attorney² was sharpened and perpetuated by a new arrangement of the duties of the profession. (4) They certainly affected the style of the law report. We must know the pleadings to understand the argument and the decision; but it is the argument and the decision in which the interest of the case centres. Decisions which turn on mere matters of fact can be eliminated. Arguments or dicta which have no bearing upon the judgment can be likewise eliminated. Thus the modern report is no mere account of conversations between judge and counsel, leading to the formulation of an issue, in which it is difficult to distinguish argument from decision, and decision from dictum; the issue is already defined; and what is reported is the law laid down by the Court upon the point thus defined. Two consequences flowed from this. In the first place the argument of counsel tends to diminish in importance compared with the ruling of the judge. We have only to compare Plowden's or Coke's reports with our modern law reports to see the truth of this. In the second place it becomes possible to cite a case by name for the decision of a distinct point. The reports in the Year Books are, as we have said, reports of arguments upon legal topics relevant and irrelevant to the issue. One case will often touch upon many points: there are comparatively few cases which we could cite by name as laying down a special rule. For this reason the Year Books made excellent material for Abridgements; we could hardly construct from them a volume of leading cases. (5) Naturally these changes had a great effect upon the law. The newer mode of reporting which was thereby made possible tended to greater precision in the statement of the law—to a greater certainty and fixity in its principles. No doubt the new mode of written pleading tended to verbal refinements and subtleties in the statement of the case which too often defeated justice³. As Roger North points out, the

¹ Black Books of Lincoln's Inn, i. 315 (Order of 1556); Dugdale, *Orig. Jurid.* 310.

² Manning, *Serviens ad Legem*, 125; Y. B. 32, 33 Ed. I (R. S.), xxxii; P. & M. i. 190, 191; cp. Greenidge, *Legal Procedure in Cicero's Time*, 146, for a somewhat analogous distinction between the cognitor and the patronus; when a litigant is represented by a cognitor he does not intervene at all; but the patronus does not represent him; if he is not himself present he is undefended; 'the patronus cannot take his place; he is only an able interpreter, intervening for the purpose of illustrating the law and marshalling the proofs in his client's interests.'

³ See Y. B. 3 Ed. II (S. S.), lxviii. Professor Maitland says of the introduction of written pleadings that, 'It forced our common law into a prison-house from which escape was difficult. Instead of being able to ascertain the opinion of the judges about the various questions of law that are involved in the case, the pleader, without any help from the Court, must stake his reputation and his client's fortune upon a single form of words.'

pleaders were less under the control of the Court than they had been in the old days¹. Perhaps, too, the greater fixity in the rules of law, which rested on the definite authority of well-known decisions, made the law less flexible than it was in the days when the mode of reporting made it necessary to cite discussions of, rather than decisions upon, a given rule of law. These difficulties were felt in the eighteenth and nineteenth centuries. In the sixteenth and seventeenth centuries the advantages of clearness and certainty must have been felt by both lawyers and laymen. A case which really settled a point upon which it was possible to cite many conflicting dicta from the Year Books must have been welcome to all. The separation of such things as the pleadings, the evidence for the statements of fact contained in the pleadings, and the decision was necessary in the interests of legal development. That the new rules which took the place of the old were perfect no one can assert. But we who saw the latter end of these new rules, and their gradual reform or abolition, will not be able to do them justice unless we look at them, not from the point of view of our modern needs, but from the point of view of the old system as we see it in the Year Books. Under these new rules sprang up the greater part of our modern common law, which in our own day has supplied the material for many excellent codifying statutes. As the Formula in Roman law bridged the gap between the period of the *Legis Actiones* and the procedure of the later Empire, so our rules of procedure under the régime of the strict law of pleading bridged the gap between the period of the Year Books and the modern Rules of the Supreme Court. In both cases the foundations of the greater part of what is valuable was laid in this intermediate period.

The Year Books represent the initial stage of the purely professional development of the common law. They picture for us that stage in a more personal and a more vivid way than any subsequent stage is pictured. Law reporting is in its youth. The law reporters do not, as we have seen, deem it beneath their dignity to notice the external incidents, the 'scenes in court,' which pass before their eyes². They give us what they see, and

¹ Life of Lord Keeper Guilford (Jessopp's ed.), i. 27, 28: 'Now the pleadings are all delated in paper, and so pass the offices, and the Court knows nothing of much the greater part of the business that passeth through it: and when causes which they call real come on and require counting and pleading at the bar, it is done for form and unintelligibly; and whatever the serjeant mumbles it is the paper book that is the text: and the Court as little meddles with as minds what is done of that sort at the bar; but the questions that arise are considered upon the paper book. All the rest of the business of the Court is wrangling about process and amendments, whereof the latter had been mostly prevented, if the Court (as formerly) had considered the first acts of the cause at the bar when offered by the serjeants.'

² See pp. 278 sqq. above.

combine the functions of the journalist and the skilled legal reporter. For all that, we can see that the strength and the weakness of a purely professional development of law is much the same then as now. Its strength is the logical grouping of confused facts under general principles, the application of those principles in detail to new states of fact, the ingenuity with which old principles and old remedies are restricted or extended to meet the new needs, physical, commercial, or moral, of another age. We see these qualities most strikingly displayed in the gradual development of new principles of delictual liability, and new principles of contract, in the recognition of the interest of the lessee for years and the copyholder. Its weakness is caused largely by the very defects which are inherent in its virtues. It cannot take large views as to the state of this or that branch of the law. It can only advance step by step from precedent to precedent. It cannot disregard the logical consequences of its principles, though in practice their strict application may be inconvenient. It is loath to admit new principles, and will not do so unless compelled by such considerations as the loss of business consequent upon the competition of a rival Court. If once a rule or a set of rules have become established they cannot be removed, however great a hindrance they become. They can only be explained or modified; with the result that the rule with the modifications and exceptions added becomes a greater nuisance than the original rule itself. We can see from the Year Books that a purely professional development is not good for the health of any legal system. The unrestrained efforts of a hierarchy of professional lawyers is apt to produce results similar to those attributed by Maine¹ to the unrestrained efforts of a hierarchy of priests; 'usage which is reasonable generates usage which is unreasonable.' English law at the close of the Middle Ages was suffering, as it suffered at the close of the eighteenth century, from a development too exclusively professional. At both periods it stood in urgent need of revision by the light of outside public opinion, if it was to meet the new requirements of another age.

W. S. HOLDSWORTH.

¹ *Ancient Law*, 19, 20.

FUTURE INTERESTS IN LAND.

II.

PART II.

VESTED AND CONTINGENT REMAINDERS.

INTRODUCTORY. Remainders, as defined in Part I of this article, include all future interests in land which are bound to take effect, if at all, by way of succession after a particular estate of freehold. It should be observed that the future interest of this sort is a remainder precisely for the reason that it is bound, either by act of the parties, or by operation of law, to take effect, if at all, by way of succession—that is, whenever and however the preceding estate may determine otherwise than by being prematurely cut short by the express provision of the settlor. We are now to divide these remainders into those that are vested and those that are contingent. It will be advisable to indicate: *First*, three different lines of distinction between vested and contingent remainders, that is to say, (a) the modern or non-feudal, (b) the feudal or common law distinction, and (c) a line of distinction peculiar to some states, and especially Illinois. *Second*, we shall consider the significance of these different lines of distinction apart from any connexion with the Rule against Perpetuities. What use do they serve? What difference does it make whether an interest is vested or contingent? *Finally*, attention will be directed to determining which of these lines of distinction between vested and contingent remainders, if any, is to be used where the application of the Rule against Perpetuities is concerned.

I. THE THREE LINES OF DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS—*The modern or non-feudal.* In a system of law newly created and consistent with modern notions and conditions, it is believed that any distinction between vested and contingent remainders would be simply a distinction between those future interests by way of succession after a particular estate of

freehold which are sure to take effect, and those which are not. In short, the distinction would be between those which are non-contingent and those which are contingent. Courts to-day are, it is believed, frequently to be found using the terms vested and contingent in such a sense. For instance, when the person to whom the future interest is limited, dies before the death of the life tenant, courts will be found considering whether the deceased took a vested or contingent remainder. In reality, all that they are considering is whether he had a future interest in fact subject to a condition precedent of survivorship¹. Such a use of the terms 'vested remainder' and 'contingent remainder' is equivalent to 'non-contingent future interest' and 'contingent future interest.' The reference is to remainders not subject to any condition precedent in fact, and those which are subject to a condition precedent. From this point of view, then, *B*'s interest in the following limitations may very properly be called contingent: to *A* for life, remainder to *B* and his heirs, but, if *B* does not survive the termination of *A*'s estate, then to *C* and his heirs. Here, if the contingency ever affects *A*'s interest at all it will prevent it from coming into possession. It can never affect *B*'s interest after it has once come into possession. The condition is, therefore, precedent in fact, and from the purely modern point of view we might, as a line of Illinois cases seems to have tended to do², well call the remainder contingent. In the same way, where the gift is to *A* for life, remainder to *B* for life, *B*'s interest from the purely modern point of view could be called contingent.

The Feudal or Common Law Distinction. Primarily, however, the distinction between vested and contingent remainders is a feudal one, just as the conception of a remainder itself is purely feudal. It need cause no surprise, therefore, to find that a perfectly rational and proper distinction from the point of view of to-day played little or no part in the distinction between vested and contingent remainders which the feudal system of land law felt called upon to recognize.

At the beginning of the fifteenth century it is believed that the principal problem of future interests was the ascertainment of what

¹ It is believed also that there are many other instances where courts use vested and contingent in the modern sense as describing contingent and non-contingent interests. For instance, in any rule that a contingent remainder-man cannot maintain a bill for partition, it is submitted that 'contingent remainder-man' may well include all holders of future interests which are in fact subject to a condition precedent, whether the same may, under the feudal distinction between vested and contingent remainders, be called vested or not.

² *City of Peoria v. Darst*, 101 Ill. 609; *McCampbell v. Mason*, 151 Ill. 500; *Furnish v. Rogers*, 154 Ill. 569; *Seymour v. Bowles*, 172 Ill. 521; *Kales' Future Interests* (Illinois), ss. 96-99.

ones were valid and what invalid. It was clear at that time that those which were bound to take effect by way of succession after a particular estate of freehold were remainders and valid. Those which were sure to take effect by way of interruption were invalid. Those which, if they took effect according to the expressed intention of the settlor, might do so either by way of succession or interruption, according as the event upon which they were limited happened before, or at the time of, or after the termination of the preceding interest, were still held absolutely void. At this point, then, the distinction was between remainders, which were valid, and interests that were not remainders which were void.

In this condition of the feudal land law it came to be held in 1430¹ that a contingent future interest after a particular estate of freehold, which, if it took effect according to the expressed intention of the settlor, might do so by way of succession or interruption, could take effect if it did so in the former mode. Otherwise it would fail entirely. This rule was the origin of the 'contingent remainder.' It applied to a contingent future interest limited after a particular estate of freehold upon an event which might happen either before, or at the time of, or after the termination of the particular estate. As Butler, in his notes to Fearn, has stated in an ill-worded but most illuminating passage²: 'All contingent remainders appear to be so far reducible under one head, that they depend for their vesting on the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination³.' Such an interest might, if carried out as limited, take effect by way of succession or interruption, according as the event upon which it was limited happened before, or at the time of, or after the termination of the preceding interest. It was a remainder because a rule of law required that it take effect by way of succession or fail entirely. Because of this rule of law the future interest was bound to take effect, if at all, by way of succession. At this point, then, the distinction between vested and contingent remainders arose. It was fundamentally not at all a distinction between contingent and non-contingent future interests. At least two learned writers⁴ have agreed that 'the word "vested" had originally no reference to the

¹ Williams, *Real Property*, 17th ed., pp. 412-13; Gray's Rule against Perpetuities, 1st ed., s. 134.

² Fearn, C. R. 9, Butler's Note g.

³ Challis (*Real Property*, 2nd ed., pp. 114-15) has re-written this passage as follows: 'All contingent remainders have this common characteristic, that they depend for their vesting upon the happening of some event, which is such that by possibility it may happen neither during the continuance of the precedent estate or *eo instanti* with the latter's determination.'

⁴ Gray's Rule against Perpetuities, 1st and 2nd ed., s. 100; Hawkins, *Wills*, 221.

absence of contingency.' The vested remainder, on the contrary, was the future interest after a particular estate of freehold (whether subject to a condition precedent or not) which was bound to take effect by way of succession, not, however, because of any rule of law, but because the expressed intention of the settlor so provided. The large distinction was between the future interest which must take effect by way of succession because it was so expressly provided, and the future interest which did so only under a penalty, which always operated to defeat the expressed intention of the settlor, that it fail entirely if it did not do so.

In the course of time (and, it is believed, perhaps a considerable time subsequent to 1430) a future interest after a particular estate of freehold which was not sure ever to take effect in possession, because subject to a condition precedent in fact, but which by the expressed intention of the settlor was sure to take effect, if at all, in that mode, became more common. Thus, in the limitations to *A* for life and then to *B* for life, *B*'s interest is not certain to come into possession, because he may die before *A*, but if it does it must do so by way of succession. So, if the limitations be to *A* for life, remainder to *B* and his heirs, but if *B* die before the termination of *A*'s life estate, then to *C* and his heirs, *B*'s interest is clearly subject to a condition precedent in fact. It is, however, so limited that if it takes effect at all it must do so by way of succession. So, if the gift be to *A* for life, and if *B* survive the termination of *A*'s life estate (whenever and however it may come to an end) then to *B* and his heirs, *B*'s interest must take effect, if at all, by way of succession. The same may be said of the gift to the right heir of J. S. when the limitations are to *A* for life and after *A*'s death to the right heir of J. S., provided the right heir of J. S. be ascertained before the termination (whenever and in whatever manner) of the preceding estate. The contingent future interests in all these cases are clearly valid¹, because they are bound to take effect, if at all, by way of succession. Are they to be called vested or contingent remainders?

From the purely modern point of view which rationally separates future interests into those which are contingent and those which are non-contingent, such future interests would be clearly contingent. From the feudal point of view it is submitted that they were most clearly vested. The feudal distinction was between those future interests which were objectionable because they might take effect by way of interruption if carried out as limited, and those which were unobjectionable because, if carried out as limited, they

¹ *Supra*, pp. 253-5.

were bound to do so by way of succession. On principle it must have been perfectly immaterial that these latter were in fact subject to a condition precedent so that they might never take effect at all. The feudal system of land law did not object to contingent future interests as such, but only to those which were limited upon such a condition and in such a way that if the future interest was carried out as limited there might be a gap between the termination of the preceding interest and the taking effect in possession of the future interest. When, therefore, a future interest after a particular estate of freehold was contingent in fact, but as limited it was sure to take effect, if at all, by way of succession, it was, from the point of view of the feudal system, wholly unobjectionable. It was, therefore, ranged over against the future interest which was objectionable because it might, as limited, possibly take effect by way of interruption. The latter, when it was recognized upon the condition that it take effect by way of succession, became a 'contingent remainder.' The contingent interest which was so limited that, if it took effect at all, it did so by way of succession, naturally fell, according to the feudal distinction, into the class of vested remainders.

It is most clear that when the condition precedent in fact is either not expressed at all or is expressed as in form subsequent, the future interest is a vested remainder. Thus, if the limitations are to *A* for life and then to *B* for life, *B*'s interest is a vested remainder¹. So, if the limitations be to *A* for life, remainder to *B* and his heirs, but if *B* die before the termination of *A*'s life estate, then to *C* and his heirs, *B*'s interest is vested². It is believed the real reason for this is that by the proper construction of the limitations the gift to *B* is expressly required to take effect, if at all, whenever and however the preceding estate may determine—that is, by way of succession.

It is submitted also that the remainder, which is bound, according to the expressed intention of the settlor, to take effect, if at all, by way of succession, is equally vested, though it is subject to a condition precedent which is expressed in form as such.

Suppose, for instance, the limitations be to *A* for life, and if *B* overlive *A*, then to *B* for life. Here, if you take the contingency literally, *B* has a contingent remainder, because the event of *B*'s overliving *A* might not occur till after *A*'s estate had come to an end prematurely by forfeiture or merger. The New Hampshire court, so long as it took the contingency literally as stated, was perfectly sound in holding the remainder to *B* contingent³. The

¹ Gray's Rule against Perpetuities, 1st and 2nd ed., s. 102.

² Ibid., s. 108. *Littlejohns v. Household*, 21 Beav. 29; *Blanchard v. Blanchard*, 1 Allen (Mass.), 223.

³ *Hall v. Nute*, 38 N. H. 422; *Hayes v. Tabor*, 41 N. H. 521.

approved construction, however, has always been that the phrase 'if *B* overlive *A*' means 'if *B* survive the termination, whenever and however, of *B*'s life estate.' Under this construction of the language used, *B*'s interest is bound to take effect, if at all, by way of succession. It is, therefore, properly held vested¹, though it is subject to a condition precedent in fact, and the condition is expressed a precedent in form. So, if the limitations are to *A* for life, and if *B* overlive *A* then to *B* and his heirs, *B*'s interest is vested or contingent according as you construe the terms of the contingency. Should the phrase 'if *B* overlive *A*' be held to mean 'if *B* survive the termination of *A*'s life estate, whenever and however that may occur,' then the remainder is vested. It is subject to a condition precedent in fact and in form, but it is bound to take effect, if at all, by way of succession. This, however, is never the construction given when the remainder to *B* is in fee, but the language is taken literally as not permitting *B*'s interest to take effect in possession until he actually survives the death of *A*. Hence there is the chance that *B*'s interest, if it takes effect as limited, will never come into possession till after the termination of *A*'s life estate. It is, therefore, a contingent remainder.

If the limitations are to *A* for life with power to appoint a remainder, and in default of appointment, to *B* and his heirs, *B* has, it is now settled, a vested remainder². There was a time when it was doubtful if this was to be the law³. It is believed that the soundness or unsoundness of holding the remainder in default of appointment vested, will clearly appear the moment the test of whether it is bound according to the expressed intention of the settlor, to take effect, if at all, by way of succession, is applied. The result reached from the application of this test will depend upon the construction given to the terms of the contingency as expressed by the settlor. If *B*'s interest is required by the expressed intention of the settlor, to await the final determination of whether the power would be exercised or not, before it could take effect in possession, then it might, if *A*'s life estate prematurely terminated by forfeiture or merger before *A*'s death, take effect, if at all, by way of interruption. It must in this view have been a contingent remainder. This was the result first reached⁴, and the reasoning upon which it was rested by Lord Hardwick was precisely that

¹ *Webb v. Hearing*, Cro. Jac. 415 (5 Gray's Cases on Property, 47).

² Gray's Rule against Perpetuities, 1st and 2nd ed., s. 111; *Doe d. Willis v. Martin*,

⁴ T. R. 39, 5 Gray's Cases on Property, 62.

³ *Fearne*, C. R. 226-7. Lord Hardwick seems actually to have held thus in the case of *Sir Robert Walpole v. Lord Conway*, Barnard Ch. Reports, 153.

⁴ *Leonard Lovie's case*, 10 Co. 78 a, 85 a; *Walpole v. Conway*, Barnard Ch. Reports, 153; *Fearne*, C. R. 226-7.

stated¹. If, however, *B*'s interest be construed as expressly limited to take effect upon the termination of *A*'s life estate, whenever and however that may occur, provided there is at that time a default of appointment, it is bound to take effect in possession, if at all, by way of succession. The condition is no less precedent in fact and no less expressed as precedent in form, yet *B*'s interest is held vested, and properly so. Doubtless the construction here resorted to has not usually been allowed outside of the case of gifts over in default of appointment. Thus, if the limitations be to *A* for life and then to *A*'s eldest son and his heirs, and in default of any son of *A* to *B* and his heirs, by the usual construction *B*'s interest cannot possibly come into possession till, by the actual death of *A*, it is determined that there can be no son of *A*. *B*'s interest can, therefore, if it take effect as limited, do so by way of interruption after the premature determination of *A*'s life estate by merger or forfeiture. It is, therefore, held to be a contingent remainder². The significant fact, however, to be noticed is that when a construction of the settlor's expressed intention is adopted which makes it clear that the remainder will take effect, if at all, by way of succession, the remainder becomes vested with a certainty quite as mathematical as the results obtained by the application of the Rule against Perpetuities, or the Rule in Shelley's case.

It would be strictly in accordance with the above authorities and the reasoning upon which the remainder in these cases is held vested to hold *B*'s remainder vested where the limitations are to *A* for life, and if *B* survive the termination of *A*'s life estate (whenever and however it may come to an end) then to *B* and his heirs. Here *B*'s interest will take effect by act of the parties and by way of succession, if at all. It is clearly distinguishable from the cases where the limitations are to *A* for life, and then, if *B* survive *A*, to *B* and his heirs. There the condition that *B* survive *A* is taken

¹ This appears from the fact that Lord Hardwicke in *Walpole v. Conway* (Barnard Ch. Reports, 153) rested his decision, that a remainder in default of appointment was contingent, upon the decision in *Loddington v. Kime* (1 Salk. 224). In the latter case the limitations were to *A* for life and then to *A*'s issue male (there being none at the time), and if *A* died without issue male, to *B* and his heirs. It was held that *B* took a contingent remainder. This was because *B*'s interest was construed not to be able to take effect in possession till, by the death of *A*, it was actually determined that he was not to have any issue male. If the gift in default of appointment be construed in the same way as not being able to take effect in possession until, by the death of *A*, it is positively concluded that he will make no appointment, the analogy between the two cases is perfect.

² *Loddington v. Kime*, 1 Salk. 224 (5 Gray's Cases on Property, 54). The time-worn rule that there can be no vested remainder after a contingent remainder in fee is no more than a declaration that the second remainder in fee, which must always be subject to a condition precedent in fact, is usually to be construed as expressly limited, not to take effect in possession at all until it has been determined by the actual death of the holder of the particular estate, that the contingency cannot happen which will prevent *B*'s estate from ever coming into possession.

literally, so that if *A*'s estate terminate before *A*'s death, *B* cannot, by the expressed language, take till *A* dies. Hence there is no certainty that *B*'s interest will take effect, if at all, by way of succession. So, if the limitations are to *A* for life, remainder to the heirs of *J. S.*, provided said heirs of *J. S.* are ascertained before the termination (whenever and however) of the preceding estate, the heirs of *J. S.* have, it is submitted, in the purely feudal sense, a vested remainder, because their interest is bound by the express provision of the settlor to take effect, if at all, by way of succession. If you call the remainder in either of these cases contingent, you can hardly say that it is destructible other than by the happening of the event as expressed by the settlor. It is not destructible by a rule of law defeating his intention. It, therefore, lacks the distinguishing attribute of a contingent remainder—an attribute which it has been attempted to be shown is the very origin and definition, from the feudal point of view, of a contingent remainder.

Professor Gray¹, in dealing with this class of remainders, seems to say that whether the remainder is vested or contingent depends upon the language employed. 'If,' he says, 'the conditional element is incorporated into the description of, or the gift to the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to *A* for life, remainder to his children, but if any child dies in the lifetime of *A*, his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to *A* for life, remainder to such of his children as survive him, the remainder is contingent.' Certainly the results reached by the application of the test in the cases put are correct. It is submitted, however, that the rational ground of difference in the results reached is, that in the first case the future interest from its form of expression is bound to take effect, if at all, by way of succession, while in the second the form of language used so far alters the condition that there is introduced the chance that the future interest, if carried out according to the expressed intention of the settlor, may do so by way of interruption—as for instance, where *A*'s life estate terminates prematurely before *A*'s death. It is believed, therefore, that the true test is not the mere form of words, but the actual effect of the expressed language in requiring the future interest to take effect by way of succession, if at all, or giving it the chance of taking effect by way of interruption. It is believed, therefore, that the remainder may be subject to a condition in substance and in form precedent, and yet it may,

¹ Rule against Perpetuities, 1st and 2nd ed., s. 108.

according to the feudal distinction, properly be called vested. Thus, if the gifts be to *A* for life and if *B* survive the termination (when-ever and in whatever manner) of *A*'s life estate, then to *B* and his heirs, *B*'s interest must in the proper feudal sense be called vested.

The error in making the test the mere form of words is that it imposes to an appreciable extent upon the purely feudal conception of vested and contingent remainders a modern or non-feudal distinction—rational enough to-day—between contingent and non-contingent future interests. Professor Gray apparently starts with the idea that all remainders in fact subject to a condition precedent in fact to their taking effect in possession, might logically have been called contingent remainders¹. This is equivalent to saying that the feudal law might have adopted the purely modern line of distinction. Then Professor Gray seems to intimate that calling the remainder vested, because the condition is expressed in form as subsequent, is a relaxation of the view logically correct from the feudal point of view, due to the preference of the law for vested interests². This, it is submitted, is incorrect. The modern line of distinction between contingent and non-contingent remainders is entirely irrelevant. The feudal or common law distinction between vested and contingent remainders was not at all built upon a distinction between contingent and non-contingent future interests. The contingency was immaterial in making the contingent remainder, except so far as it created the chance that the remainder might not, if carried out as limited, take effect in possession after the termination, whenever and in whatever manner, of the preceding interest. Whenever the contingency failed to produce that effect the remainder failed to be a contingent remainder and was vested. Where the contingency was expressed as in form subsequent, there was created a case where the condition precedent failed to furnish the chance that the future interest might not take effect till after the termination of the preceding interest. The remainder, therefore, was vested upon the application of entirely correct feudal principles. It is improper to say that there was any relaxation of a logically correct view in holding the remainder vested.

The following statement of the purely feudal distinction between vested and contingent remainders is proposed. *Vested remainders* are, (a) those future interests after a particular estate of freehold which are sure to take effect in possession, and when they do, must so take effect by way of succession, and (b) those which, while not sure ever to take effect in possession, are bound by the expressed terms upon which they are limited to do so, if at all, by way of succession.

¹ Gray's Rule against Perpetuities, 1st and 2nd ed., s. 105.

² Ibid.

Contingent remainders, on the other hand, include those future interests after a particular estate of freehold, which, if they take effect as expressly limited, may do so by way of succession or interruption, according as the event upon which they are limited happens before, or at the time of, or after the termination of the preceding interest, but which, according to a rule of law, must take effect by way of succession or fail entirely.

If this statement of the distinction is correct it can be expressed in even more precise terms. The event or events which must happen before a future interest after a particular estate of freehold can come into possession, must necessarily occur either before, or at the time of, or after the termination of the particular estate. If by the expressed intention of the settlor they are bound to occur, if at all, before or at the time of the termination (whenever and however that may occur) of the particular estate, then the remainder is vested. If by the expressed intention of the settlor they may do so before, or at the time of, or after the termination (whenever and in whatever manner) of the preceding interest, the remainder is contingent. Once settle the question of when the event or events upon which the future interest is to take effect in possession must or may occur, and the application of the feudal rule, which determines whether the remainder is vested or contingent, is as mathematical in its character as the Rule in Shelley's case, or the Rule against Perpetuities.

A third distinction peculiar to some States and especially Illinois. It has already been pointed out that from a purely modern point of view the distinction between vested and contingent future interests would naturally be equivalent to that between non-contingent and contingent future interests by way of succession after a particular estate of freehold. This would add to the list of contingent remainders a class of contingent future interests which the common law (and very properly from its point of view) called vested. A well defined tendency to this effect is, as has been intimated¹, to be found in the decisions of the Supreme Court of Illinois. A new distinction between vested and contingent remainders adopted by some American States, and, curiously enough, most strikingly by the Supreme Court of Illinois, seems to go to quite an opposite extreme. It incorporates into the class of vested remainders contingent future interests after a particular estate of freehold which the common law called, and properly called, contingent remainders. Thus, the Illinois Supreme Court has within the last few years apparently irrevocably adopted the rule that a remainder

¹ *Supra*, p. 384.

is vested at any particular time, provided it is ready to take effect in possession, if the preceding interest should then come to an end. Pursuant to this rule, in *Boatman v. Boatman*¹, it was actually held that where the limitations were substantially to *A* for life and then to such child or children of *A* as survive him (there being no child *in esse*), but if *A* dies leaving no child or children surviving him, then to *B* and his heirs, *B*'s interest was vested so long as *A* was without issue. Here, of course, *B*'s interest might have been held vested according to the common law or feudal conception of a vested remainder, if the remainder to *B* could have been construed to have been limited to take effect in possession, whenever and however *A*'s life estate might determine. This, however, the court did not do, nor, it is believed, could it properly have done so in view of the authorities generally, and under the wording of the contingency as expressed. The case, therefore, stands for a new definition of a vested remainder. If this innovation obtains and is pressed to its logical extreme, then, where the limitations are to *A* for life and then to *B* if he survive *A* (meaning literally if he outlive *A* without reference to when *A*'s life estate may determine), *B* will have a vested remainder.

II. APART FROM THEIR USE AS LIMITING THE APPLICATION OF THE RULE AGAINST PERPETUITIES, WHAT PURPOSES DO THESE SEVERAL DISTINCTIONS SERVE? — *The modern or non-feudal distinction*. As for the purely modern distinction it simply furnishes in the word vested a synonym for non-contingent. The consequences of the distinction are those which follow from a future interest being contingent or non-contingent. These consequences, it is believed, are entirely rational from the modern point of view. It is worth noticing, however, that where the Illinois Supreme Court in dealing with the limitations to *A* for life, remainder to *B* and his heirs, but if *B* die before the termination of *A*'s life estate, then to *C* and his heirs, tended to hold that *B* had a contingent remainder, it was impelled to do so for the purpose of getting rid of the feudal rule that after a vested remainder in fee you cannot have a valid contingent future interest. In short, the conception of a contingent remainder as one which was subject to a condition precedent in fact, was adopted in order to avoid, without disturbing the language of the feudal rule, the application of the common law principles which forbade the creating of shifting future interests².

¹ 108 Ill. 414. See also in accord *Chapin v. Nott*, 203 Ill. 341.

² It would, it is submitted, have been better to have squarely held that shifting future interests by deed were valid. This might have been done upon several grounds: *Kales' Future Interests (Illinois)*, ss. 149-52.

The feudal or common law distinction. As for the feudal distinction, at least two peculiarly feudal consequences make it important. If the remainder were contingent in the feudal sense it was *ex hypothesi* destructible, that is, it failed entirely unless it took effect by way of succession. If a vested remainder, it was destructible, that is, it failed, if at all, only because it was expressly provided that it should fail in the events which happened. Vested remainders were transferable *inter vivos* by grant and attornment. There were, however, two feudal difficulties with the transfer *inter vivos* to strangers in the same manner of the remainders which the common law called contingent. It was literally true that from the feudal point of view, the contingent remainder was nothing until, by the happening of the event upon which it was limited, before the termination of the preceding interest, it became certain that it would take effect by way of succession. Until then it was void¹. There was a natural difficulty about sustaining the effectiveness of the transfer of an interest which had no actual existence. Then there was a feudal public policy which regarded the transfer of such interests as champertous². These consequences of holding a remainder contingent in the feudal sense no longer exist, except where legislative progress has been slow, or courts unalive to the effect of modern statutes. The state of the law generally upon the destructibility of contingent remainders has already been reviewed in a former article³. By statute in England, contingent remainders seem now entirely transferable by deed without covenants of warranty⁴. It is submitted that the same result might have been reached in Illinois, under certain provisions of the Act concerning conveyances⁵. The Supreme Court of Illinois, however, has from time to time intimated otherwise, and seems to feel itself still bound to follow the feudal rule concerning the non-transferability of contingent remainders⁶.

The third distinction peculiar to some States and especially Illinois. As for the new distinction which the recent Illinois cases have made between vested and contingent remainders, that seems to have been invented only for the single purpose of getting rid of the feudal rule regarding the non-transferability of contingent remainders by quit claim deed. In *Boatman v. Boatman*⁷, the case

¹ *Supra*, p. 258.

² Williams, *Real Property* (17th Int. Ed.), 422; *The Mystery of Seisin*, F. W. Maitland, L. Q. R. ii. 481.

³ L. Q. R. xxi. 118.

⁴ 8 & 9 Vict. c. 106, s. 6 (1845).

⁵ R. S. 1874, Ch. 30, s. 10.

⁶ *O'Melia v. Mullarkey*, 124 Ill. 506; *Walton v. Follansbee*, 131 Ill. 147, 159; *Williams v. Esten*, 179 Ill. 267; *Boatman v. Boatman*, 198 Ill. 414; *Kales, Future Interests (Illinois)*, ss. 76, 77.

⁷ 198 Ill. 414.

which is the foundation of this distinction, the new definition of a vested remainder was introduced solely for the purpose of making the future interest alienable by quit claim deed, and the Illinois court seems (quite unnecessarily it is true), in *Chapin v. Nott*¹, to have followed the new definition in order to hold the future interest descendible².

III. THE SCOPE OF THE APPLICATION OF THE RULE AGAINST PERPETUITIES AS AFFECTED BY THE DEFINITIONS OF A VESTED REMAINDER—*As affected by the new definition adopted in some States and especially Illinois.* It has now become well settled that the Rule against Perpetuities does not apply to vested remainders. It is coming to be said, quite commonly, that it applies to contingent remainders³. In what sense are 'vested' and 'contingent' here used?

It is not believed possible that in the use of these terms reference can be made to the future interests after a particular estate of freehold, which the recent Illinois cases called 'vested.' To do so would be to hold a gift in fee to an ascertained person after an indefinite failure of issue in the life tenant valid, so long as the life tenant had no issue at all. It should be appreciated that this new definition of vested remainders was adopted by the Illinois court to get rid of the feudal restriction upon the transferability of contingent remainders. Perhaps it might with equal logic be used, if necessary, to get rid of the rule of destructibility of contingent remainders. By so doing, however, the future interest called a contingent remainder would at once cease to be a remainder, since it would no longer, by act of the parties or by operation of law, be sure to take effect, if at all, by way of succession. It would lose its feudal character and become what it is according to the intention of the settlor—an interest which may take effect either by way of interruption or succession. Even if the Rule against Perpetuities does not apply to feudal contingent remainders, it must apply to such an interest. The logical result, then, of the Illinois cases making certain future interests after a particular estate of freehold vested is (paradoxical as it may seem) to make them most clearly subject to the Rule against Perpetuities⁴.

¹ 203 Ill. 341.

² It is submitted that the better course would have been to have recognized that the statutory quit claim deed was sufficient to pass a contingent remainder (Kales, *Future Interests*, s. 78), and that all contingent remainders descend unless the death of him who is to take upon the happening of the contingency is such an event as for ever makes it impossible for his interest to vest (Kales, *Future Interests*, s. 72).

³ *In re Frost*, 43 Ch. Div. 246 (5 Gray's Cases on Property, 598); *In re Ashforth's Trusts*, 21 T. L. R. 329 (1905); Gray's Rule against Perpetuities, 1st and 2nd ed., s. 248.

⁴ It is not clear that the Illinois Supreme Court perceived this, for if it had, the future interest in *Chapin v. Nott*, 203 Ill. 341, which was held to be vested, might

Whether limited by the feudal or common law distinction between vested and contingent remainders or by the modern or non-feudal distinction. If we use 'vested' in the feudal sense, can it be said that the Rule against Perpetuities does not apply to any remainder which is vested, even though it be in fact contingent? This is substantially the same as the question whether the Rule applies to all remainders which might from the purely modern point of view be called contingent. Suppose, for instance, the limitations are to *A* for life and then to *A*'s unborn son for life, remainder to *B* and his heirs, but if *B* or his issue do not survive the unborn son, then to *C* for life. Here, *B* takes a vested remainder in the feudal sense at once. He has, in fact, an interest subject to a condition precedent that he or his issue shall survive a person now unborn, who may die twenty-one years after *A*'s death. It would, therefore, be a contingent remainder from the modern point of view. Is *B*'s future interest void for remoteness?¹

Of course there need be no inquiry along this line unless we at least assume that the Rule against Perpetuities applies to the future interests which the feudal system called contingent remainders. If this rests upon the broad ground that the rule is a modern one, applicable to contingent future interests generally, and that it is desirable that no exception be made of contingent remainders, even if they are feudal interests which were valid long before the Rule against Perpetuities ever existed, then it ought equally to apply to contingent future interests which are called vested, i.e. to remainders which would be called contingent from the purely modern point of view.

It is hard to see, also, why the same reasoning would not cause the rule to apply to all vested remainders which were not subject to any condition precedent, but which might come into possession at too remote a time. A gift to take effect in possession after twenty-two years is too remote. What difference should it make that there is a gift to *A* for twenty-two years and then to *B* in fee? A gift to take effect after the death of an unborn person, or the certainty of his non-existence, is too remote. Why should it make any difference that the limitations are to *A* for life, then to the unborn son of *A* for life, and then to *B* and his heirs? The only difference in both instances is that where the future interest is held valid it is bound to take effect by way of succession. But why

well have been held to be too remote. The application, however, of the Rule against Perpetuities seems not in any way to have been touched upon either by court or counsel.

¹ The case put raises this question clearly, for if the Rule does apply then, under *Monypenny v. Dering*, 2 De G. M. & G. 145, *C*'s life estate will fail. If the Rule does not apply to *B*'s interest then *C*'s will be valid.

should that make any difference in the application of the Rule against Perpetuities? That is only the reason that made the future interest inoffensive under the feudal system of land law. If that is not a good reason when dealing with contingent remainders which are bound to take effect by way of succession, or vested remainders which are in fact contingent, why is it not equally bad when we come to vested remainders which are non-contingent? If the fact that the future interest is valid under the feudal system of land law is a good reason why the Rule against Perpetuities does not apply where the future interest is a vested remainder and non-contingent, it is an equally good reason where it is a vested remainder, though contingent, and where it is a contingent remainder. Nothing can be more firmly settled, however, than that remainders which are vested and non-contingent are not subject to the objection for remoteness, though they may not take effect in possession for too long a time¹. It must follow that a remainder which is vested under the feudal system of land law, but which is in fact contingent, cannot be void for remoteness. Thus, in the case put, where the limitations are to *A* for life and then to *A*'s unborn son for life, remainder to *B* and his heirs, but if *B* or his issue do not survive the unborn son, then to *C* in fee, *B*'s interest is not too remote. These results, it is believed, necessarily rest upon the ground that, historically, vested remainders are interests which were valid under a system of land law which never felt the necessity of the Rule against Perpetuities. That reason applies with equal force to all the other future interests which the feudal system recognized², including contingent remainders³.

The proper explanation of the modern tendency to single out contingent remainders in the feudal sense and say that the Rule applies to them, and not to remainders which are, from the feudal point of view, vested, but in fact contingent, would seem to be this: the feudal contingent remainder is in reality an executory interest which may take effect by way of succession. It is by nature a non-feudal future interest. This is clear from the fact that the feudal

¹ Gray's Rule against Perpetuities, 1st and 2nd ed., ss. 206-7.

² However it may be in England since in *Re Hollis' Hospital* [1899] 2 Ch. 540, it is conceded that in America Rights of Entry for Condition broken must be regarded as not subject to the Rule against Perpetuities (Gray's Rule against Perpetuities, 1st and 2nd ed., ss. 304-11). The Illinois Supreme Court has recently in terms so held: *Walsfeld v. Van Tassel*, 202 Ill. 41.

³ 'The doctrine that contingent remainders are not subject to the modern Rule against Perpetuities is supported by the authority of the following judges and writers:—(1) Mr. Fearn; (2) Mr. Charles Butler; (3) Mr. Preston; (4) Mr. Burton; (5) The Real Property Commissioners (Lord Campbell, W. H. Tinney, Lewis Duval, John Hodgson, Samuel Duckworth, P. B. Brodie, and John Tyrrell); (6) Lord St. Leonards; (7) Mr. Joshua Williams; (8) Mr. George Sweet; (9) Mr. Leake; (10) Mr. Challis.' (Perpetuities, by Mr. Charles Sweet, L. Q. R. xv. 71, 85.) See also Challis, Real Property, 2nd ed., pp. 183-6.

system originally refused to recognize its validity. It became a feudal future interest only when it became destructible—that is, when it was required to take effect by way of succession or fail entirely. The moment, then, that the contingent remainder ceases in the slightest degree to be destructible, it becomes a future interest which is liable to take effect in possession by way of interruption under some circumstances. The future interest, therefore, ceases to have the absolutely necessary characteristics of a remainder. It becomes of necessity an executory interest and subject to the Rule against Perpetuities. Thus, where the limitations were all equitable the contingent future interest was indestructible and subject to the Rule¹. In precisely the same way all contingent remainders governed by the Contingent Remainders Act of 1877² must be subject to the Rule. In American jurisdictions where by statute or the action of the courts contingent remainders are no longer destructible, and perhaps never have been, the same result must be reached. In the recent cases³, however, where it has been held that the contingent remainder was subject to the Rule against Perpetuities, the limitations involved were governed by the Contingent Remainders Act of 1845⁴. Nevertheless, by the same reasoning, when that Act provided that the contingent remainder should be capable of taking effect 'notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects, as if such determination had not happened,' the future interest became liable to take effect by way of interruption in case of the premature determination of the particular estate by forfeiture, surrender, or merger. It, therefore, became an executory interest and subject to the Rule⁵. The same results must follow in American jurisdictions where the statute is similar in effect to the Contingent Remainders Act of 1845.

CONCLUSION. The objection to the usual attempted distinction between vested and contingent remainders (assuming it to avoid the error of suggesting that it is fundamentally a distinction

¹ *Abbiss v. Burney*, 17 Ch. Div. 211 (5 Gray's Cases on Property, 575).

² 40 & 41 Vict. c. 33.

³ *In re Frost*, 43 Ch. Div. 246 (5 Gray's Cases on Property, 598); *In re Ashforth's Trusts*, 21 T. L. R. 329 (1905).

⁴ 8 & 9 Vict. c. 106, sec. 8.

⁵ The fact that the Real Property Commissioners who recommended the Contingent Remainders Act of 1845 also recommended that in case that Act were passed contingent remainders should be made subject to the Rule against Perpetuities, does not, it is submitted, indicate that the latter statute was absolutely necessary. Nor does the fact that Parliament refused to act upon the latter recommendation necessarily indicate that it was supposed that the Rule against Perpetuities would have no application. The legislature may as well be thought to have regarded an Act to that effect unnecessary. For a contrary opinion, however, see *Perpetuities*, by Charles Sweet, L. Q. R. xv. 83.

between contingent and non-contingent interests after a particular estate of freehold) is that the language used bears on its face absolutely no suggestion of a reason for the distinction described. One may even read Professor Gray's exposition¹, which appears to the writer to be one of the most illuminating, and yet come away without the slightest idea of the reason for making the distinction indicated. If the inquirer has any preconceived idea that he is approaching a distinction between contingent and non-contingent interests, he is at the outset warned that this is not so by the hint that 'the word "vested" had originally [that is from the feudal point of view] no reference to the absence of contingency².' Then he is brought face to face with the following definition of a vested remainder: 'A remainder is vested in A, when, throughout its continuance, A or A and his heirs have the right to the immediate possession, whenever and however the preceding estates determine³.' This formula, it is believed, so far as appears from its face, gives no hint of the rationale of the distinction. The reader may look in vain for an explanation of the reason upon which it is based. It is no excuse to say that the definition is the result of feudal conceptions, for even feudal rules have a reason which can be understood to some extent to-day. It is believed that a greater clearness of ideas can be obtained by a comparatively slight shifting of the point of view. It should be indicated with some emphasis that the distinction developed under the feudal or common law of land, and that the vested remainder is the future interest limited by act of the settlor to a stranger after a particular estate of freehold, which the feudal land law always recognized as valid, while the contingent remainder is precisely the future interest after a particular estate of freehold limited by act of the settlor to a stranger, which the common law at first refused to recognize and afterwards did so only upon particular terms. The moment, then, that it is determined upon what principle the feudal system recognized the validity of one class of future interests and refused recognition of the other, you have the rational principle upon which the distinction between vested and contingent remainders is to be drawn. The distinction, then, between vested and contingent remainders was actually set out when in Part I it was determined what future interests the common law always recognized and what ones it at first refused to recognize, but afterwards accepted upon particular terms. It has only remained in Part II (after distinguishing certain modern and exceptional notions of what remainders are vested and what contingent) to point out that what we have always called vested and

¹ Rule against Perpetuities, 1st and 2nd ed., ss. 100-112.

² Ibid., s. 100.

³ Ibid., s. 101.

contingent remainders correspond exactly to these two classes of interests. This method of exposition has, it is believed, not only given the distinction an historically rational basis for existence, but has resulted in more clearly divorcing the distinction itself from questions of construction and expressing the distinction in terms of a formula as mathematical and certain as the Rule in Shelley's case or the Rule against Perpetuities.

ALBERT MARTIN KALES.

PROTECTED LIFE ESTATES: A SUGGESTION.

THE desire to render property inalienable by operation of law must necessarily be as old as the law of execution. But the early efforts of conveyancers in this direction at first met with scant success. It was no doubt a difficult problem so to delimit an estate that the owner might enjoy substantial advantages in it without the possibility of his creditors doing the same. The reports show that the problem was solved by a process of evolution.

The settlement by one person on another until alienation or bankruptcy and then over to some one else, a very old plan, was open to the obvious objection that bankruptcy or alienation entirely put an end to the original beneficiary's interest.

Another ingenious experiment is illustrated by the cases like *Graves v. Dolphin* (1 Sim. 66; 27 R. R. 166) and *Green v. Spicer* (1 Russ. & Mylne, 395; 32 R. R. 232). Property was limited for the exclusive personal maintenance and support of the beneficiary, with an express declaration that it was not to be liable to his debts. But the bottom was soon knocked out of this device by the principle that settlors cannot by mere declarations exclude the ordinary incidents and liabilities that the law has attached to property.

In cases of the class of *Page v. Way* (3 Beav. 20; 52 R. R. 2) and *Kearsley v. Woodcock* (3 Hare, 185; 64 R. R. 255), the trusts were for the maintenance and support of the bankrupt and his family; and it was held that the bankrupt's interest passed to the assignee. These decisions are generally explained by the absence of a power in the trustees to exclude the bankrupt altogether. The judgments, which are very short, say nothing to that effect; and it cannot be that the Court was merely giving effect to the settlement according to its terms, and allowing the assignee in bankruptcy such interest only as the bankrupt took under the settlement. Because such reasoning overrides the discretionary power in the trustees to give the bankrupt bare maintenance and support—that is an interest which would not pass to his assignee—and to appropriate the balance to his family. It would appear rather that the Vice-Chancellors looked at the substance of the thing and regarded the trust for the maintenance and support of the bankrupt as a trust for him simpliciter; although no doubt the absence of a power to exclude him helped them to take this view of the instrument. At

any rate they made short work of the trustees' discretion, and in practically all cases gave the bankrupt's aliquot share to the assignee, and sometimes even the whole fund, subject only to the maintenance of the bankrupt's family.

But in the year 1840, the case of *Twoopeny v. Peyton* (10 Simons, 487; 51 R. R. 301) was decided by Shadwell V.-C. A lady had bequeathed to her trustees the income of certain funds upon trust to apply the whole or such part thereof at such time or times in such proportion and in such manner for the maintenance and support of her nephew Peyton, as her executors in their discretion should think most expedient. Peyton was a person of weak intellect, and at the date of the bequest was also bankrupt. The assignee claimed his interest; but Shadwell V.-C., impelled perhaps by that sympathy which must ever temper the administration of human justice, held that the moneys were not applicable for the benefit of the nephew generally, but merely for his maintenance and support, and that the assignee could claim nothing thereunder.

Two years later Shadwell V.-C. followed a similar course of reasoning in *Godden v. Crowhurst* (10 Simons, 642; 51 R. R. 332), a case where the bankrupt was not the sole object of the discretionary trust. And it would appear that these two cases are the foundation upon which the modern protected life estate has been built: Mr. Davidson (Davidson's Precedents, vol. iii, pt. 1, p. 125 note) considered these cases had probably gone too far against the assignee, and they were virtually overruled in *Youngehusband v. Gisborne* (1 Coll. 400; 66 R. R. 120). But the reports since show a chain of judicial decisions, which, if they do not always uphold the protected life estate, make it tolerably certain that, with properly framed limitations, most creditors will not think it worth while to challenge their validity.

For the nature of a beneficiary's right under these trusts is so shadowy, that there is nothing that an assignee or trustee in bankruptcy can take.

As Cotton L.J. said in *Re Coleman* (39 Ch. D. 451), 'If the trustees were to pay an hotel keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy.' And so, no doubt, if a trustee arranged with an hotel keeper for the board and lodging of a named beneficiary for a year, no one else could step into the beneficiary's shoes. The hotel keeper might rightly say, 'No, I contracted to board and lodge *A B*, I am not going to take *X Y*.' So that a bankrupt might be living in the lap of luxury while his creditors perforce content themselves with hopes of dividends. This is the inevitable result of a literal construction of

such trusts. And inasmuch as it is really for the benefit of the bankrupt alone that the trustee of the settlement is given any discretion in the matter at all, so that even the trustees' discretionary powers may be said to form part of the bankrupt's beneficial interest, creditors may well feel that such a construction is narrow and artificial, and that, looked at broadly, these trusts confer valuable rights of property, which are on a different footing to personal earnings, and which might, without injustice to the settlor, be held to confer on the trustee in bankruptcy a right to an apportioned part of the trust income.

However, the Courts at present are not prepared to go that length, and, meanwhile, the full possibilities of such settlements do not seem to have reached the limits to which they might logically be carried. There is, of course, always the danger that the Courts might at this eleventh hour revolt from these schemes to defeat creditors and hold them void as frauds on the law. But it would appear at present logically possible, as a corollary upon the accepted form of protected life estate, for several persons to unite in a settlement which would for practical purposes place their property out of the reach of process of execution, and at the same time would reserve to them a substantial measure of dominion thereover.

The few guiding principles to be borne in mind in framing such a settlement are: (a) that a man cannot take an interest terminable on bankruptcy in his own property: *Higinbotham v. Holme* (19 Ves. 88; 12 R. R. 146); (b) but he can take such an interest in property settled by some one else: *Lockyer v. Savage* (2 Stra. 947); and (c) a man can settle property upon trustees upon trust to apply the proceeds for the maintenance and support of one or more persons of a group comprising himself: *Holmes v. Penney* (3 K. & J. 103). But there must be a clear power to exclude the bankrupt. And lastly, (d) these qualifications can only be attached to life interests and reversions, as they are repugnant to absolute interests in possession, *Re Dugdale* (38 Ch. D. 176).

Without going outside these limits, it seems possible to enlarge the sphere of utility for these protected life estates by a scheme on the following lines:—

Four persons, *A*, *B*, *C* and *D*, having £1,000 each, desire to place it as far as possible out of the reach of creditors.

So *A* settles his £1,000 upon *B* and *C* as trustees, with the usual discretionary trusts in favour of 'such one or both of *A* and *D* as the trustees shall agree upon,' any part of the income as to the application of which they cannot agree to be paid absolutely to another person *X*.

B settles his £1,000 on *C* and *D* with similar trusts in favour of

B and *A*, and a similar gift over to *X*; and *C* and *D* make similar settlements of their respective £1,000 upon the next two, in what the Algebra books call cyclic order, with a discretionary trust in favour of their respective selves and the other member of the four in each case, with an ultimate gift over of unapplied income to *X*.

The scheme will, perhaps, be best described in tabular form:—

- | | |
|---|---|
| (1) <i>A</i> settles £1,000 on <i>B</i> and <i>C</i> upon the discretionary | } <i>A</i> and <i>D</i>
in favour of |
| trust described above | |
| (2) <i>B</i> " " " <i>C</i> and <i>D</i> " " " " <i>B</i> and <i>A</i> | |
| (3) <i>C</i> " " " <i>D</i> and <i>A</i> " " " " <i>C</i> and <i>B</i> | |
| (4) <i>D</i> " " " <i>A</i> and <i>B</i> " " " " <i>D</i> and <i>C</i> | |
| (5) with an ultimate gift over to <i>X</i> in each case of all income which the trustees cannot <i>both</i> agree to apply for one or other of the primary beneficiaries. | |

Now in each of these cases the settlor apparently surrenders all the advantages of property in his £1,000 and throws himself upon the mercy of his trustees. But in fact he has a reasonable assurance that the income will, until he shall go bankrupt or alienate it, be paid to the settlor himself, and that after bankruptcy or alienation, it will, so far as possible, be applied for his benefit. For each beneficiary under one settlement is at the same time a trustee of another, and as trustee he has a veto over the income of each of his own trustees, and so can bring pressure upon his own trustees for the proper application of his own income. In the case of settlement No. (1), if *B* and *C* both insist that all the income shall be paid to *D*, or unless they both agree in paying it all to *A*, then in (3) and (4) *A* can veto the application of any income at all to either *C*, *B*, or *D*, and the income in both those cases will, by the terms of the trust, have to be paid to *X*, who is made the receptacle to catch all unapplied income. And the settlor in each of the other cases has a similar safeguard. It would not be necessary always to have four parties to the transaction. The same result could be reached with three or more, but an increase in the number of parties would necessitate a corresponding increase in the number of trustees.

It is, of course, very questionable whether such a scheme would hold water. It appears to be within the four corners of the principles accepted by the Courts in these cases, and would have the advantage of not being a voluntary settlement, though the consideration in each case is perhaps a somewhat indefinite quantity and unascertainable in terms of pounds, shillings and pence. But from an ethical point of view these settlements to defeat creditors are quite dishonest, and the Court might well lay hold of any

circumstance to defeat their frankly fraudulent end. In a comparatively recent case (*Hemming v. Neil*, 62 L. T. 649) decided in 1890, the trust was 'for the support, maintenance, or education or otherwise for the benefit of' the testator's son Philip (which words are almost identical with the common form adopted by Key and Elphinstone), and in that case Mr. Justice Kekewich, emphasizing the word 'benefit,' held, and with submission reasonably held, that money paid to Philip or to any person on his behalf, was necessarily part of his beneficial interest under the will, and would pass to an assignee of all Philip's estate and interest thereunder.

So that it is impossible to say how far a settlor can safely go in this direction. But for persons with moderate means, or trading partners who do not wish to stake all their private capital on their concern, it might be worth while to lock up their spare capital in the manner indicated above for the purpose of securing limited liability.

While paying their way they would be no worse off than before, and in the event of execution or bankruptcy their position might be considerably improved.

W. J. LEOF. AMBROSE.

MARINE INSURANCE—THE SUE AND LABOUR CLAUSE.

AND in case of any Loss or Misfortune it shall be lawful to the Assureds their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the said Goods and Merchandise and Ship &c. (or any part thereof) without Prejudice to this Assurance to the Charge whereof we the Assurers will contribute each one according to the Rate and Quantity of his sum herein assured.'

This provision, embodied in the common form of policy of Marine Insurance in use at the present day, is known as the Sue and Labour clause; and it is with the origin, object, and effect of this clause that the present inquiry is concerned.

The only sure foundation on which to base such an inquiry is a correct appreciation of what the law of marine insurance really is.

This has been well expressed by Mr. Serjeant Marshall (1802) in the preliminary discourse to his 'Treatise on the Law of Insurance,' where he says¹:—

'The law of insurance is considered as a branch of marine law, and was borrowed by us from the Lombards, who first introduced the use of this contract into England. It is also a branch of the law of merchants, being founded on the practice of merchants, which is nearly the same in all countries where insurance is in use; and indeed, merchants themselves were, for a long time, the only expounders of it. The law of merchants, not being founded in the institutions or local customs of any particular country, but consisting of certain principles which general convenience has established, to regulate the dealings of merchants with each other in all countries, may be considered as a branch of public law. "*Non erit alia lex Romae alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore, una eademque lex obtinebat*" (Cic. Off. 3). . . . If it be asked where the law of insurance is to be found; the answer is, in the marine law, and in the custom of merchants, which may be collected (1) from the ordinances of different commercial states; (2) from the treatises of learned authors on the subject of insurance; (3) from judicial decisions in this country and others, professing to follow the general marine law and the law

¹ 3rd ed., 1823, edited in the author's lifetime by his son, Charles Marshall, of the Inner Temple, vol. i, at p. 17.

of merchants. Particular ordinances have seldom gone farther than to define, and to sanction by legislative authority, those principles which were already received as law in all commercial countries. . . . These ordinances are not, it is true, in force in England; but they are of authority, at least as expressing the usage of other countries upon a contract, which is presumed to be governed by general rules, that are understood to constitute a branch of public law. *Non habent vim legis, sed rationis.*'

At Bordeaux, in 1647, Cleirac¹ published *Les Us et Coustumes de la Mer*, in which he reproduced a treatise on marine insurance known as *Le Guidon de la Mer*². The name of the author of this world-famed treatise—the one sure source of information as to the early customs of merchants in matters of marine insurance—is not known, nor now perhaps can ever be. But that his work was held in high esteem in 1647 is well established by Cleirac himself in a prefatory passage where he says³:—

'L'auteur n'a rien obmis si ce n'est seulement d'y mettre son nom, pour en conserver la mémoire, & l'honneur qu'il mérite d'avoir tant obligé sa Patrie & toutes les autres nations de l'Europe.'

And—the research of intervening centuries not affecting it—to the careful investigator, the patient seeker after historic truth, to the law student, the bar, and not less to the bench, this treatise is a Guidon still. Of it Pardessus writes:—

'Il est prouvé par le texte du Guidon, qu'à l'époque de sa rédaction l'usage en (des assurances maritimes) étoit général dans la France, l'Italie, la Flandre et l'Angleterre, et que cet ouvrage offre le résumé de tout ce qui étoit pratiqué dans ces pays⁴.'

Yet the exact date of its first appearance, in spite of untiring industry and exhaustive inquiry, remained concealed from this distinguished lawyer, who having satisfied himself that it could not have been subsequent to 1607—while it might have been between 1556 and 1584—allocated its publication generally to the closing years of the sixteenth century⁵.

With regard to its authorship he but ventures the suggestion, 'Il a été composé par un particulier⁶.'

The doctrine of abandonment is dealt with in Chapter vii (*Des Delais ou Delaissemens*), section 4 of which is as follows⁷:—

¹ Étienne Cleirac was 'avocat au parlement de Bordeaux.'

² The most ancient treatise in any modern language on insurance.' Duer, *Mar. Ins.*, N. York, 1845, vol. 1, p. 45. ³ Edn. 1661, p. 213.

⁴ Collection de Lois Maritimes antérieures aux XVIII^e siècle (Paris, 1831), tome II,

p. 370.

⁵ Ibid., p. 372.

⁷ Cleirac, p. 281; Pardessus, p. 402.

⁶ Ibid., p. 371.

'Quand le navire est pris ou jetté à la coste par tormente en pays étranger, et qu'il y a quelque espoir de recouvrance du tout ou en partie, il est en liberté de l'assuré de faire ses delais, ou autrement s'arrester à protestation, et quelque poursuite ou adjonction qu'il donne aux assureurs, cela ne luy portera de préjudice que par aprez il ne fasse son delais.'

It will be seen that this section concedes to the assured the right—if indeed it does not impose on him a duty—to be diligent, and co-operate with the underwriters for the purpose of recovering his goods; while it expressly reserves to him the further right to abandon, if need be, at a later period. And it is noticeable that Cleirac, commenting on this section, confines his remarks to the legal effect of the noting of a protest¹, the permission to assist in the recovery of the goods being—it would seem—too well established to call for attention.

Writing in 1786, and giving his reasons, Park expresses the conviction that 'abandonment dates its origin from the period at which the contract of insurance was itself introduced'²; and on this, it might well be argued, that such a permission—important to the shipowner on account of his freight, to the freighter on account of his shipment, and to the underwriter on account of the liability of his policy—must have been a rule of marine insurance coeval with the doctrine of abandonment.

But—not pressing this argument—it seems certain that the compiler of the *Guidon* ('un particulier' Pardessus) can only have recorded those rules and customs of commerce which by their long observance had become legalized, and that among them nothing new or original is to be found. If then the true date of this treatise be not later than 1600, moderation is not exceeded by the suggestion, that as early at least as 1500³—by which time Insurance had been practised in Europe for 300 years—the right of the trader to protect his property was, as an incident of abandonment, as freely acknowledged as the right of abandonment itself. And more than this need not be established.

In the celebrated 'Ordonnance de la Marine du mois d'août 1681,' the completeness and comprehensiveness of which transcends alike all codes which it had succeeded and those by which it has been followed, 'will be found,' says Marshall⁴, 'the best and most complete system of positive law for the regulation of insurance that has yet (1802) appeared in any country.'

¹ *Protestatio conservat ius ideo in actibus dubiis fieri debet, &c.*

² *The law of Mar. Ins.*, 1786, 7th ed. (author's), 1817, vol. i, p. 229.

³ Marshall (p. 20) thinks that the *Guidon* itself was 100 years anterior to this date.

⁴ p. 19.

The promulgation of this legislation embodying the collective wisdom and learning of France, and adding new dignity to the throne of her king, Louis XIV, was due to the genius and ability of that Prince's great minister—with whose name it must for all time be associated,—Jean-Baptiste Colbert.

Now, it is no small compliment to its unknown compiler, that the little Guidon should in after years have been the foundation on which was built up in the Ordonnance all that is there to be found on the subject of insurance. Of this Pardessus gives ample acknowledgment when he says¹, 'Aussi presque toutes les décisions du Guidon ont-elles été adoptées et converties en loi par l'Ordonnance de Louis XIV, du mois d'août 1681, qui forme encore (1831) le droit commun de l'Europe.'

The law of Insurance is set out in Chapter vii of Book iii, in Articles 42 and 45 of which is reproduced the particular legislation of the Guidon, just considered.

Article 42 re-enacts the doctrine of Protestation, which, as Valin² in a note points out, is in accordance with the earlier teaching of the Guidon.

Article 45 is as follows³:—

'En cas de naufrage ou échouement, l'assuré pourra travailler au recouvrement des effets naufragés, sans préjudice du délaissement qu'il pourra faire en temps & lieu, & du remboursement de ses frais, dont il sera cru sur son affirmation, jusqu'à concurrence de la valeur des effets recouvrés.'

The principle of permission to work for the recovery of property is accepted by Valin, as it previously had been by Cleirac, without comment, its inherent propriety no less than its ancient origin having, it would seem, long removed it from the region of controversy. But Valin is careful to explain that this permission has relation only to the ultimate right of the assured to abandon⁴, which right was not to be prejudiced thereby; while in many cases—if he would avoid the imputation of fraud—it was the bounden duty of the assured to assist his underwriters; as, for example, where being on board with his merchandise, he was in a position to exercise effective control over it.

If then a duty in 1681, it must *a fortiori* have been a duty in the early days of insurance, out of which arose the rules afterwards to

¹ p. 371.

² *Commentaire sur l'ordonnance de la marine* du mois d'août 1681; Ed. Rochelle, 1766, p. 96. This work first appeared 1760. Valin died 1765.

³ *Ibid.*, p. 98.

⁴ Emerigon also states this in very clear terms, *Traité des Assurances*, 1783; éd. par Boulay-Paty, Rennes, 1827, tom. ii, p. 235.

be embodied in the Guidon, when it was customary for a merchant to accompany his goods, and act as his own supercargo.

And, secondly, the reimbursement to the assured of the expense incurred by him in attempting the recovery of his property. Of this Valin says: 'L'assuré étant autorisé à faire travailler au sauvement, il est *juste* qu'il soit remboursé des frais qu'il aura faits à ce sujet.'

Here, again, there would seem to be no ground for suggesting that in this respect the Ordonnance was propounding new law.

No such view is put forward by Valin, and probability points in the opposite direction.

For as it cannot solemnly be contended that justness and the observance of it began with Louis XIV, this particular justness must always have supported the rule of commerce out of which it sprung, a rule which without this support would quickly have fallen into disuse.

Lastly, it will be seen that the extent of the underwriters' liability is strictly limited to the value of the property recovered. The result of this is that any settlement in excess of a total loss of the sum insured is effectively shut out from the policy.

Pothier, indeed, discussing this article, lays it down that an option rests with the underwriters of surrendering the goods in payment of their salvage, thus:—

'Mais comme les assureurs ne sont tenus de ces frais, suivant le dit article (45), que jusqu'à concurrence de la valeur des effets recouvrés, les assureurs peuvent les laisser à l'assuré pour les frais¹.'

From this it results, that when nothing has been recovered the assured—like an unsuccessful salvor—receives no recognition of his service, the cost of which, however well intentioned towards his underwriters, must be borne by himself alone. This must be remembered.

As in 1681, so it is to-day a rule of law, that the payment of a total loss of the sum assured exhausts the liability of an underwriter under his policy contract, and it would be difficult to show that a different rule had at any previous time obtained².

Had this law been a creation of Ordonnance, such an innovation could not have escaped the notice and critical comment of Valin,

¹ *Traité du contrat d'assurance* (1767/8); éd. par Bugnet, Paris, 1847; tom. v, p. 317, s. 131.

² Although in its present connexion this statement will scarcely provoke criticism (*Lohre v. Aitchison* (1879) 4 App. Cas. 755), occasions not infrequently arise where it is sometimes thought that the rule has been held to have no application. See *Le Cheminant v. Pearson* (1812) 4 Taunt, 367, 13 R. R. 636, at p. 642.

whose silence, alone, is wellnigh conclusive. But Emerigon is silent too; Emerigon, who, in respect of the law of Marine Insurance, was to France what Lord Mansfield at the same period was to England¹, and of whose generous and scholarly assistance the learned commentator has himself made grateful acknowledgment, in a passage eloquent and sincere which concludes with these words:

‘Il m’en a donc fait passer une copie (de tout ce que par une étude assidue et réfléchie il avoit recueilli de décisions et d’autorités) dont j’ai fait un tel usage, que presque tout ce que l’on trouvera de bon dans ce Commentaire, quant à la partie de la Jurisprudence, est en quelque sorte autant son ouvrage que le mien².’

And when it is remembered that between the year 1500 and the publication of the Ordonnance the Sue and Labour clause had been introduced³, which, though not to be found in every policy, had by 1681 been extensively adopted, it may well have been that it was found expedient to define in clear terms what that law really was which parties to the contract of Insurance, not forbidden to modify, could never be permitted to ignore.

Accepting then the theory enunciated by Marshall (p. 407 above) that ‘particular ordinances have seldom gone farther than to define and to sanction by legislative authority those principles which were already received as law in all commercial countries,’ the foregoing arguments are put forward as justifying the proposition that the wording of Articles 42 and 45 is but the language necessarily accurate and precise, in which—without adding to them—the corresponding but cruder decisions of the private compiler of the *Guidon de la Mer* were ‘adoptées et converties en loi’ (Pard., p. 409 above) by the professional draftsmen of the *Ordonnance de la Marine*.

If this be so, it must follow that the right of the assured to work for the recovery of his merchandise in danger of destruction, without thereby imperilling his ultimate right to abandon if so need be, and the co-relative liability of his underwriters to make good to him the expense so incurred up to the value of the property

¹ Emerigon was Judge of the Court of Admiralty at Marseilles, 1748–61, when he retired and devoted himself to study till his death in 1784. Lord Mansfield was Chief Justice of the King’s Bench, 1756–88, and died 1793.

² Valin, Pref. ix.

³ The earliest example of a Sue and Labour clause to be found in the Select Pleas of the Court of Admiralty, edited by the Selden Society, is—with accidental appropriateness—contained in a contemporary translation of a French policy bearing date London, January 8, 1565 (vol. ii, p. 56).

This volume sets out two Italian policies of the years 1547 and 1548, and five English policies of the years 1555, 1558, 1559, 1562, and 1563, in which the clause is not to be found.

The earliest policy, known to the writer, in the English language, embodying it is dated London, February 15, 1613, and is reproduced in Martin’s *History of Lloyd’s* (1826) at p. 46, from the Tanner MS., No. 74, fo. 32, Bodleian Library, Oxford; see also Gow. Ins., 3rd ed., 1903, p. 319.

saved, were as early as 1500, customs of insurance having the force of law amongst the sea-faring countries of Europe.

It must, however, be confessed that there are two text-writers of great authority to whom this theory has not commended itself, Marshall and Arnould.

Marshall says:—

‘It was formerly doubted whether the insured could use his endeavours to recover the goods which had been lost, or in preserving such as had been saved, without waiving his right to abandon. To obviate this doubt a clause (sue and labour) was introduced into the policy, &c.¹

Arnould in similar language, free from ambiguity, propounds the same doctrine².

In support of his statement Marshall cites Casaregis disc. iii, sec. 14, where in effect, it is said that if the assured have authority from his underwriters to attempt a recovery, his acts are deemed to be theirs, and he need not abandon. But when he has not their authority, he retains his status of owner, and in order to recover a total loss must abandon forthwith³.

Now whether this authority is given independently of the policy, or is to be gathered from the Sue and Labour clause, the dictum of this learned Florentine lawyer is in direct conflict with the Guidon and the Ordonnance, which show that a right to the assured to labour for the recovery of his goods, without thereby prejudicing his right of abandonment, had existed from very early times⁴.

And this is admitted to be so by Emerigon, who citing the same reference says:—

‘On avait douté si l’assuré, en recouvrant les effets sauvés, préjudiciait à ses droits vis-à-vis des assureurs. Cette difficulté a été aplanie par l’article 45, titre des assurances, qui permet à l’assuré de travailler au recouvrement des effets naufragés sans préjudice du délaissement qu’il pourra faire en tems et lieu⁵.’

Arnould, on the other hand, relied on the more recent authority of *Mitchell v. Edie*⁶ (1787), where Ashhurst J. said:—

¹ Marshall, at p. 340.

² Arnould, *Mar. Ins.*, 1st ed. (1848), vol. i, p. 35.

³ *Discursus Legales de Commercio*, Florence, 1719, vol. i, pp. 11, 12.

This is to be gathered from ss. 11–15 inclusive.

The particular section cited, no. 14, which read by itself, is not very instructive, runs: ‘Et in his terminis quando assecuratores dederint talem facultatem assecuratis instandi pro huiusmodi recuperatione, omnes deinde actus facti ab assecuratis pro mercibus recuperandis, licet simpliciter gesti, & nulla de mandato facta fuerint mentio, attribui debent ipsis assecuratoribus mandantibus.’

This divergence of opinion coming from the land that gave birth to marine insurance, twenty-eight years after the appearance of the Ordonnance, is not without interest.

⁴ It seems strange that Emerigon, on whose support the two Englishmen had so often relied, should, in this important connexion, have been completely ignored.

⁵ 1 T. R. 608; 1 R. R. 318.

‘It is contended that the assured never waive their right to abandon, while they are managing in the best manner they can for the benefit of all concerned; and that argument is grounded on the common clause inserted in every policy, whereby he is authorized “to sue labour, and travail without prejudice to this insurance.”

Now this clause does not in my apprehension warrant the position in so large an extent as it is contended for.

It seems to me that the meaning of the clause is, that till the insured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment!’

But this, as shown, had long been anticipated by the Guidon and ratified by the Ordonnance, and is scarcely adequate to account for the presence in the policy of a stipulation of so elaborate a nature.

What then was the object, the attainment of which was successfully effected by the introduction of the Sue and Labour clause?

And first it is to be observed that the clause, couched in general terms and not concerning itself with rights of the assured in respect of abandonment, contemplates the happening of *any* loss or misfortune. This has been clearly stated in *Kidston & Empire Marine Ins. Co.*¹ (1866), where Willes J. said:—

‘Not only the generality of the words, but also the subject-matter to which they relate, . . . point to the application of the clause to all cases in which the underwriter is saved from liability to loss, whether partial or total, and whether an abandonment does or may possibly take place or not.’

Suppose then that—as frequently happens—a vessel be driven by stress of weather to seek shelter in an intermediate port, and that, in order to enable her to complete the voyage insured, temporary repairs must there be effected; and further, that the cargo, of a perishable nature, being found wetted have to be discharged, dried, resorted, and repacked to render it fit to be carried on and delivered at destination in specie.

The repairs to the ship and the cost of reconditioning the cargo are alike charges contemplated by the clause, and the burden of them is cast upon the underwriters. Yet in this there is nothing which necessarily exceeds the responsibility imposed upon underwriters by the Ordonnance. But once again, suppose that after leaving her port of distress, the vessel with her cargo be totally lost before arriving at the *terminus ad quem* of the policy. What then? In such a case the assured, supported by the general law alone, would find himself without right to reimbursement of the

¹ L. R. 1 C. P. 535.

cost of his efforts, however disinterested they may have been, and however much—but for the subsequent loss—they would have benefited his insurers.

This, whenever his efforts had been fruitless, was the position of the assured; and this was the position—as unfair to the assured as it was repugnant to the best interests of his underwriters—which was deliberately swept away by the framers of the Sue and Labour clause. For the clause recognizes no limitation of liability, and imposes no condition as to success of undertakings within its contemplation, the cost of which, when properly incurred, is in all cases to be made good to the assured.

Such was the object of the clause, and such, undisputed, is its effect.

Of this no doubt was entertained by Emerigon, who thus asks and answers his own question :—

‘Si les frais de sauvetage excèdent la valeur des effets sauvés, cet excédant est-il à la charge des assureurs ?’

Suivant les clauses insérées dans les formules de diverses places de commerce, les assureurs, indépendamment des sommes par eux assurées, sont tenus de payer l’excédant des frais de sauvetage¹.

And after reciting various forms adopted by Antwerp, and by different towns in France, he declared without qualification that

‘Par ces formules, les pouvoirs les plus libres sont donnés à l’assuré et à ses repré’sentans, afin de les inviter à travailler au sauvetage, sans être arrêtés par la crainte d’en supporter eux-mêmes les frais ; mais les assureurs, en souscrivant pareils pactes, contractent à l’aveugle un engagement dont les conséquences sont indéfinies².’

The English clause would seem to have scarcely varied since its first adoption, the form set out at the commencement of this note being almost an exact verbal reproduction of that to be found in a policy dated London, Feb. 15, 1613, already referred to (n. *supra*).

This is true also of policies on the Continent, of which the three following, antedating the appearance of the Ordonnance (1681), reveal no practical difference when contrasted with the forms set out by Emerigon as being in vogue in 1783 in the towns of Antwerp, Rouen, Nantes, and Bordeaux.

A French policy dated London, Jan. 8, 1565, a contemporary translation of which has been reproduced by the Selden Society³, after giving the assured in usual form authority to work for the

¹ Emerigon, p. 258.

² *Ibid.*, p. 239.

³ Although dated London, this policy is French in form as well as in language, and cannot be deemed an English contract : v. also n., p. 411 above.

recovery of his goods, proceeds:—‘And we shall paye all charges averedge and expenses whiche shall beren at the sewte and saving of them said shippes and merchandisses *be yt that there be anything recovered or not.*’

Cleirac gives a form of policy of the date Rouen, Oct. 15, 1629¹, which authorizes the assured ‘en cas que fortune advienne, de mettre, ou faire mettre la main pour la recuperation des dites marchandises, tant en nostre profit qu’en nostre dommage, les pourrez vendre & distribuer si besoin est sans nous demander permission ny congé: & payerons tous frais avancez & despensez qui se feront.’

Lastly, the Selden Society have reproduced a translation of a Dutch policy, dated ‘first of Maye, 1638 in Hamburrowe²’, in which the Sue and Labour clause concludes: ‘And wee doe promise in all cases (or howsoever itt happen) to paye the costs and charges made in the said recouerie and benefitting of the said marchandises *whether there be any thing thereof obtayned or not.*’

The form given by Emerigon as in force in his day at Rouen is identical with the earlier one set out by Cleirac; while those of Antwerp, Nantes, and Bordeaux, like their prototypes (*supra*), are expressed to be operative whether in result anything shall have been saved or not³. This suggests once more that the Ordonnance had created no new law; and the clause, thereby losing none of its effect, required no material alteration. The conclusion then submitted is—that the Sue and Labour clause originated in a desire of underwriter and assured for mutual assistance in times of danger, and that its object, co-extensive with its effect, was not to ‘obviate a doubt⁴’ but to surmount a barrier erected in infancy by Insurance for its own protection, and long years afterwards to all Europe made manifest, by those words of limitation in the famous Ordonnance of the Grand Monarque—‘jusqu’à concurrence de la valeur des effets recouvres’ (Liv. III, Titre vi des Assurances, Art. 45).

H. BIRCH SHARPE.

¹ Cleirac, p. 348; Pardessus, p. 430.

² Select Pleas in the Court of Admiralty, vol. ii, p. 57.

³ Emerigon, p. 238. ‘*Anvers*: Soit que quelque chose soit recouvree ou non. *Nantes*: Soit qu’il y ait un recouvrement ou non. *Bordeaux*: Soit qu’il se sauve quelque chose, ou point.’

⁴ Marshall, p. 340.

THE BASIS OF CASE-LAW.

II.

3. *PUBLIC policy and other practical considerations as primary sources of case-law.*

(a) We may first consider that comparatively small part of case-law in which certain contracts, and certain conditions and other provisions in contracts, wills, and other documents, have been declared void by the Court, on the ground of public policy. That the Superior Courts have a general jurisdiction in this regard, when uncontrolled by precedent, is clearly established by the great case of *Egerton v. Earl Brownlow*¹, and the decisions therein referred to. There the House of Lords had to determine the question whether the following proviso in the will of the Earl of Bridgewater was valid: 'If Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void.' Four out of the five Lords who delivered judgments, or speeches, pronounced the proviso void as against public policy, and in so doing distinctly upheld the general power of the Court to ground its decisions, in such cases as this, upon public policy in the broad sense. The House, in the first instance, had referred the question to the Judges, whose views, with the exception of those of Pollock C. B., did not harmonize with the conclusion afterwards come to by the House itself. Pollock C. B., however, puts the matter in the clearest way. He says (p. 140, et seq.):—

'It is perfectly clear and certain (as a principle of law) that if this condition be against public good it is void. This is distinctly laid down in Sheppard's Touchstone, Ch. 6, where among other conditions which are contrary "to law," or "against the liberty of the law," a condition is also pronounced to be void which is "against the public good": and the learned writer must have meant something other than and different from "contrary to law."'

He then proceeds to consider how far 'public policy' or the 'good of the State' has been recognized as a ground of decision with respect to covenants, contracts, and other such matters, and says (pp. 144-5):—

'This doctrine of the public good or the public safety, or what is

¹ (1853) 4 H. L. C. 1.

sometimes called "public policy," being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and on that alone . . . It is distinctly laid down by Coke (Co. Litt. 66a) "*nihil quod est inconveniens est licitum.*"

He then refers to cases in which, upon grounds of public policy, the Courts have relieved from marriage-brokers bonds, and have pronounced against insurance by seamen of their wages, and against contracts of trustees with their cestui que trust, and against contracts of the nature of wagers. At p. 149 he says:—

'I think I am not permitted merely to follow decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example.'

Among the Peers these views are supported, in the strongest way, by Lords Lyndhurst, Brougham, Truro, and St. Leonards, while Lord Cranworth L. C., though he disagrees as to the validity of the proviso in question, by no means pronounces against the power of the Court. Lord Lyndhurst says (p. 160):—

'It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void . . . What cases come within the rules must be decided as they successively occur. Each case must be determined according to its own circumstances. When the case of a trustee dealing with his cestui que trust was first considered, it must, in the absence of precedent, have been determined upon weighing the public mischief that would arise from giving sanction to such dealing. So as to transactions between attorneys and their clients: also as to seamen insuring their wages, and other similar cases referred to in the course of the argument. The enquiry must, in each instance, where no former precedent had occurred, have been into the tendency of the act to interfere with the general interest. The rule, then, is clear. Whether the principal case comes within the rule, it is the province of the Court in each instance, acting with due caution, to determine.'

Lord Truro (p. 195) says:—

'The principle embodied in the maxim, *sic utere tuo ut alienum non laedas*, applies to the public in at least as full force as to individuals. There are other maxims equally expressive of the principle, *nihil quod est inconveniens est licitum*, and *salus reipublicae suprema lex*. The principle I conceive to be universal, as governing as well transfers by deed, as the validity of contracts and dispositions by will . . . This principle has been expressed in different language, but in all cases to the same import as applying to matters contrary to law because against the public good . . . Public policy, in relation to this question, is that principle of the law which holds that no subject could lawfully do that which has a tendency to be injurious to the public, or

against the public good. There, no doubt, will be occasionally difficulty in deciding whether a particular case is liable to the application of the principle: but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every State governed by law. Judges... must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation.'

Thus it was on the ground of public policy that in *Evans v. Jones*¹ the Court of Exchequer held, in accordance with previous decisions, that a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge is illegal; whilst on the other hand, in *Cooke v. Turner*², the same Court held against the alleged invalidity, on the ground of public policy, of a condition in a Will of real estate that if the devisee should dispute the Will, or the testator's competency to make it, the disposition in favour of such devisee should be revoked, because, as Rolfe B. said (p. 736): 'The State has no interest whatever apart from the interest of the parties themselves.'

The House of Lords in *Egerton v. Earl Brownlow* distinctly overruled the view of the law advanced by judges of no less reputation than Cresswell J., Alderson B., and Parke B. in that case, that 'public policy' as a basis for judicial decision must be understood to mean no more than 'policy of the law.' Alderson B. states this view very clearly (p. 106):—

'If by public policy is meant the object and policy of a particular law, then I readily accept it as a rule, for it is a very reasonable mode of construing a particular law to look at the object with which it was framed, and the evil it was apparently intended to remove... But here it seems to be contended that an act, possible and legal, but in the opinion of sensible men not expedient to be done, is for that reason to be void as contrary to public policy. Now I think that this, which is really what is here meant, would altogether destroy the sound and true distinction between judicial and legislative functions.'

So, also, Parke B. says (p. 123):—

'It is the province of the statesman, and not the lawyer, to discuss, and of the legislator to determine, what is the best for the public good, and to provide for it by proper enactments... The term "public policy" may indeed be used in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established law.'

It is important to point out clearly that this restricted view of

¹ (1839) 5 M. & W. 77; 52 R. R. 645. ² (1846) 15 M. & W. 727; 71 R. R. 808.

what is meant by public policy as a basis of legal decision in the matters now in question, is so distinctly overruled by the Lords in *Egerton v. Earl Brownlow*, because in the recent case of *Janson v. Dreifontein Consolidated Mines, Lim.*¹, Lord Halsbury L. C. recurs to it. There it was contended that a policy on gold consigned from South Africa to London, the insured being an alien corporation of the South African Republic, and which gold was seized by the government of that Republic nine days before declaration of war with Great Britain, in contemplation of war, and in order to use the gold in support of the war,—was an unlawful contract as against public policy. Lord Halsbury says (p. 491):—

‘I do not think that the phrase “against public policy” is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy . . . I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or what is relevant here, the assisting of the King’s enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a Judge or Court have a right to declare that such and such things are in his or their view contrary to public policy . . . To permit such a discussion to arise, it must be a question of some public policy recognized by the law.’

Now exactly the same view had been expressed by Cresswell J. in *Egerton v. Earl Brownlow*, supra, who says (p. 87):—

‘Contracts in restraint of trade have been said to be illegal as against public policy, but in truth, it is part of the common law that trade shall not be restricted . . . ; and unreasonable contracts in restraint of trade violate the policy of that part of the common law, and are therefore illegal.’

But the reply of Lord St. Leonards (pp. 237–9) is surely decisive. He says that the law as to contracts in restraint of trade, which Cresswell J. thought depended upon some rule of common law, regardless of policy, ‘was founded upon public policy, and has been restrained and limited, and qualified, up to this very hour, and beneficially so, by that very policy which it is supposed had no bearing at all upon the foundation of the rule.’ Of the other Lords who delivered judgments in *Janson v. Dreifontein Consolidated Mines, Lim.*, Lord Robertson’s judgment should, perhaps, be read as upholding the same view as Lord Halsbury’s, inasmuch as, in holding against the extension of the laws prohibitive of trade with the

¹ [1902] A. C. 484.

King's enemies to future or contingent enemies, on the ground that to do so would be unworkable in practice, and productive of endless uncertainty and loss, he adds (pp. 504-5) :—

'I mention these considerations not as if we were here as legislators, or had to decide upon the balance of general considerations. But the question whether it is workable or salutary is one of the tests of any legal doctrine.'

The four other Lords, however, who delivered judgments in this case, by no means deny the power of the Court to extend the operation of the existing rules about trading with the King's enemies, on grounds of public policy; and Lord Lindley (p. 507) fully recognizes the rule that 'a contract or other transaction which is against public policy, i. e. the general interest of this country, is illegal'; and cites *Egerton v. Earl Brownlow* in support, but adds that 'public policy is a very unstable and dangerous foundation on which to build until made safe by decision.' Lord Davey also observes (p. 500), that 'public policy is always an unsafe and treacherous ground for legal decision.'

Now as to the scope of this conception of public policy, upon the ground of which judges have the power to declare contracts, and provisions and conditions in wills and other documents illegal, this is referred to by Lord Truro in his judgment in *Egerton v. Earl Brownlow* (p. 196), where he says that :—

'Public policy has been confounded with what may be called political policy, such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.'

It is true indeed that contracts hostile to friendly States will not be enforced, and so in *De Wütz v. Hendricks*¹, Best C. J. held it illegal for persons in England to enter into engagements to raise money to support the subjects of a government in amity with England in hostilities against their government, and that no right of action could arise out of such a transaction. He so decides, however, on the ground that it is 'contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country.'

Moreover, it must be remembered, as pointed out by Fry L. J. in *Davies v. Davies*², a case in which the validity of a contract in restraint of trade was in question, that—

'The law with regard to public policy is one of a very different

¹ (1824) 2 Bing. 314; 27 R. R. 660.

² (1887) 36 Ch. D. 359, at pp. 396-7.

description from the law which is laid down in absolute terms for all time . . . It is impossible to look at the history of the law and not to see that contracts which at one time were deemed—and I dare say justly deemed—to be contrary to public policy, at another time have been deemed to be consistent with public policy, and for the public benefit.’

And this is nowhere more strikingly illustrated than in the case of *The Maxim-Nordenfelt Guns and Ammunition Co. v. Nordenfelt*¹, where Lord Watson says (at p. 553):—

‘A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with, and formulate principles which are purely legal. The course of policy pursued by a country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy.’²

And in that case, though the weight of authority was with the view that contracts in general restraint of trade were necessarily void, such a contract, covering a period of twenty-five years, and unrestricted as to space, was upheld as valid, because not wider than was necessary for the protection of the plaintiff company, having regard to the nature of the business, and not injurious to the public interests of England. And Courts are never likely to overlook, either the dictum of Burrough J. in *Richardson v. Mellish*³, that ‘public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail’; or that of Jessel M.R. in *Printing and Numerical Registry Co. v. Sampson*⁴, that—

‘You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by Courts of Justice. Therefore, you have this paramount

¹ [1893] 1 Ch. 630; [1894] A. C. 535.

² See also S. C. per Lindley L. J. [1893] 1 Ch. at p. 648; per Bowen L. J., ib., at pp. 661–5.

³ (1824) 2 Bing. 229, at p. 252; 27 R. R. 603, 622.

⁴ (1875) L. R. 19 Eq. 462, at p. 465. Jessel M. R. there held that an agreement by the vendor of a patent to assign to the purchaser all future patent rights which the vendor might thereafter acquire of like nature to the patent sold, was not contrary to public policy.

public policy to consider that you are not lightly to interfere with this freedom of contract.'

(a) *Other legal rules based on considerations of public policy and the general good.*

It is a general rule of English law, illustrated, among other cases, by *Rylands v. Fletcher*¹ that a person who brings on his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, does so at his peril, whether he be negligent in the matter or not. But in *Nichols v. Marsland*² we find the rigour of the law modified upon the ground that it is not well to interfere with the reasonable use of property in a way beneficial to the community. There it was held that one who had a reservoir on his land, and had used reasonable care to keep the water safely, was not liable to an action for damages resulting from an escape of the water caused by a storm, the effect of which it was practically, though not physically, impossible to resist. Bramwell, B. says (at pp. 259-63):—

'Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? . . . I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose, and did mischief, that the man who kept him would not be liable. But this case, and the case which I put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. . . . Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation.'

Another example is offered by the judgment of Lord Blackburn in *Dallon v. Angus*³, who (at p. 824) says that the reason given by Lord Hardwicke in *Attorney-General v. Doughty*⁴ for the rule of law that a right of a window to light and air is acquired by prescription, while a right to have a prospect can only be acquired by actual grant, namely, that if that were not so, there could be no great towns,—is a better reason than that given in the case of *Bland v. Moseley*⁵, namely, that the former is matter of necessity and the other of delight; and adds:—

'I think this decision, that a right to prospect is not acquired by prescription, shows that, while on the balance of convenience and inconvenience, it was held expedient that the right to light, which

¹ (1868) L. R. 3 H. L. 330. This was a case of water escaping out of a reservoir down some old vertical mine shafts, and flooding the plaintiff's mine.

² (1875) L. R. 10 Ex. 255.

³ (1881) 6 App. Cas. 740.

⁴ (1752) 2 Ves. Sr. 453.

⁵ Temp. 29 Eliz., cited 9 Co. Rep. 58 b.

could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of a prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement.'

*Lawton v. Lawton*¹ illustrates the same thing. There Lord Hardwicke held that a fire engine, set up for the benefit of a colliery by a tenant for life, should be considered as part of his personal estate, and go to the executor, because, as he says (p. 16) :—

'It is very well known that little profit can be made of coal mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is put up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.'

In truth the law often sacrifices not only the convenience of individuals, but their just claims, to considerations of public convenience, and the general good; and will even sometimes let palpable dishonesty or gross negligence go free, rather than depart from a general principle which on the whole operates beneficially. 'Fiat iustitia, ruat coelum' is by no means a principle of the law of England. Thus in *Wason v. Waller*², the Court of Queen's Bench had to decide, for the first time, whether a faithful report in a public newspaper of a debate in Parliament, containing matter disparaging to the character of an individual, spoken in the course of a debate, is actionable at the suit of the latter; and in the absence of direct authority, decided in favour of the negative, upon the basis of the principles underlying the well-settled immunity of reports of the proceedings of Courts of Justice, namely, that the legal presumption of malice is rebutted by the circumstances; and in the language of Cockburn C. J., delivering the judgment of the Court (at p. 88), 'the other and the broader principle . . . that the advantage to the community from publicity being given to the proceedings of Courts of Justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good.' This, he says, is, in the opinion of the Court, 'the true ground' of the immunity conceded to reports of proceedings of Courts of Justice. So likewise the immunity of witnesses and of judges for words spoken in the course of judicial proceedings, though ever so malicious, rests upon the same principle of public policy. And in *Munster v. Lamb*³ it was decided, for the first

¹ (1743) 3 Atk. 13.

² (1868) L. R. 4 Q. B. 73.

³ (1883) 11 Q. B. D. 588.

time, that the same protection must be extended to counsel, even to counsel who deliberately and maliciously slanders another person, if he does so in reference to and in the course of the judicial inquiry. As Brett M. R. says in that case (p. 604):—

‘The reason of the rule is, that a counsel, who is not malicious, and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel may never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.’

So in *Russell v. Men of Devon*¹ the Court of King’s Bench held that an action would not lie against the inhabitants of a county for injury sustained ‘owing to a county bridge being out of repair, upon what Ashhurst J. (p. 673) calls ‘a general principle of law,’ ‘that it is better that an individual should sustain an injury than that the public should suffer an inconvenience’; for he adds, ‘if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy.’

So again in *Evans v. Evans*² Sir William Scott says:—

‘The repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. . . . In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.’

And for a case where the law lets palpable dishonesty go free, rather than depart from a general principle which on the whole operates beneficially, we may look at the law of sale, and the application of the maxim *caveat emptor*. The desired illustration could not be given more concisely than by one of the examples in Sir William Anson’s work on Contracts³:—

‘A sells X a piece of china. X thinks it is Dresden China. A knows that X thinks so, and knows that it is not. The contract holds. A must do nothing to deceive X, but he is not bound to prevent X from deceiving himself as to the quality of the article sold.’

¹ (1788) 2 T. R. 667; 1 R. R. 585, 591. ² (1790) 1 Hagg. Cons. Cas. 35, at p. 36.
³ (11th ed.) p. 156.

Yet it would require a considerable power of drawing delicate moral distinctions to point out how far, if at all, *A* is morally better than a thief. Again, what more detestable piece of roguery could there be than sending to a public market pigs which one knows to be infected with a contagious disease, though the same be not obvious to the eye, and allowing an innocent purchaser to buy them, take them home, and place them among his own pigs, even if one does declare the sale to be 'with all faults,' and that no warranty will be given, and that the pigs are open to inspection. Yet this is exactly what the defendant did in *Ward v. Hobbs*¹, and yet the plaintiff in whose hands the pigs died, as well as other pigs with whom they had been placed, was held to have no remedy, inasmuch as the conduct of the defendant in exposing the pigs for sale in the market, could not be said to amount to a representation that they were free from disease. Yet Brett L. J. says²: 'Such conduct seems to me to be immoral and dishonest, and dishonest to a high degree, yet there is no remedy because there is no representation.' And Lord Selborne says, in the same case, in the House of Lords (p. 29):—

'The argument which, for some time, most weighed with me was, that for a man to sell to another, without disclosing the fact, an article which he knows to be positively noxious, and which the other man does not know to be so (even though he expressly negatives warranty, and says that the purchaser must take his bargain with all faults) is an actionable wrong. I confess I should not be sorry if the law were so; but I know no authority for the proposition that such is the law, even with respect to the particular case of infectious disease in animals sold.'

It is some consolation that in a subsequent but very analogous case a distinction was drawn, turning on the presence or absence of a declaration that the sale is 'with all faults.' In *Clarke v. Army and Navy Co-operative Society*³ it was held that where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to the person opening it, unless special care was taken, and that the danger was not such as presumably would be known to or appreciable by the purchaser, unless warned of it, the duty was, independently of any warranty, cast upon the vendor, to warn the purchaser of the danger.

And we may find an example of the law practically condoning negligence in order to maintain intact a beneficial general principle, in such cases as *Winterbottom v. Wright*⁴. There the defendant had contracted with the Postmaster-General to provide a mail coach to

¹ (1877-8) 2 Q. B. D. 331; 3 Q. B. D. 150; 4 App. Cas. 13. ² 3 Q. B. D. at p. 162.

³ [1903] 1 K. B. 155.

⁴ (1842) 10 M. & W. 109; 62 R. R. 534.

convey the mail bags along a line of railway, and certain other parties had contracted to horse the coach, and had hired the plaintiff as driver. The plaintiff sustained injuries while driving the coach owing to its breaking down through latent defects in its construction. The Court of Exchequer of Pleas, however, held that the action could not be maintained. Lord Abinger says (p. 114):—

‘Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I see no limit, would ensue.’

While Rolfe B. adds (p. 116):—

‘This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque iniuria*. It is no doubt a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law.’

This case was followed, and the same principle applied, in *Earl v. Lubbock*¹, where the plaintiff, a driver in the employment of owners of vans, brought an action to recover damages from the defendant, who was under a contract with the owners of the vans to repair them, for an injury received from the wheel of a van, which he was driving, coming off. Mathew L. J. says (p. 259):—

‘It is impossible to accept such a wide proposition, and indeed it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade.’

So, lastly, in regard to the maxim *Ignorantia iuris neminem excusat*, Mr. Justice Holmes says in his work on the Common Law:—

‘Every one must feel that ignorance of the law could not be admitted as an excuse, even if the fact could be proved by sight and hearing in every case. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases, in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law has determined to make men know and obey, and justice to the individual is readily outweighed by the larger interests on the other side of the scale.’

Selden in his *Table Talk* (Temple Classics, p. 72) explains the policy of the rule a little differently, saying:—

‘Ignorance of the law excuses no man; not that all men know the law, but because ‘tis an excuse every man will plead, and no man can tell how to confute him.’²

¹ [1905] 1 K. B. 253.

² Austin assigns the same reason: ‘If ignorance of law were admitted as a ground of exemption, the Court would be involved in questions which it were scarcely possible to solve,’ &c.: 5th ed., Lect. xxv, p. 482.

But here a very important and obvious distinction is to be noticed. Judges in making case-law do frequently, as we have seen, base it upon considerations of public policy and convenience, even at the cost of individual wrong; but it is a noteworthy principle of English law, and may, perhaps, be justly numbered among the bulwarks of British liberty, that where a legal right already exists, no considerations of public convenience, or national policy, can deprive the possessor of the right of his proper remedy. Thus in *Stretton v. Great Western and Brentford R. W. Co.*¹, where the plaintiff having obtained judgment in ejectment against a railway company, which had constructed its line over about an acre of his land without taking the proper steps to expropriate it, was put into possession, and when his possession was disturbed by the railway company, was granted an injunction to restrain it, Lord Hatherley L. C. says (p. 761):—

‘With regard to what is said as to public interests, I am not inclined to listen to any suggestion of public interest as against private rights acquired in a lawful way.’

So, again, in *Walker v. Ware, &c., Ry. Co.*,² where the owner of land taken by a railway company was held entitled to a lien on the land taken for the purchase money, and for compensation for severance, Sir J. Romilly M. R. says (p. 19):—

‘The Company cannot take property without paying for it, and then say that it is for the interests of the public that the property should be used by them, and so deprive the vendor of his lien. The public can have no rights springing from injustice to others’:

and the company appearing to have no funds in hand sufficient to answer the claim, a reference to ascertain the amount due was directed, to be followed by payment or sale in the usual way. So, again, in *Caldwell v. Vanvliissingen*³, where an injunction was granted restraining subjects of the kingdom of Holland from the unlicensed use of the plaintiff’s patented invention on board their ship within the dominions of England, the invention being a method of propelling vessels, Turner V.-C. says (at p. 430):

‘One principal ground of inconvenience suggested was that if foreign ships were restrained from using this invention in these dominions, English ships might equally be restrained from using it in foreign dominions; but I think this argument resolves itself into a question of national policy, and it is for the legislature, and not for the Courts to deal with that question.’

(b) *Other practical considerations as primary sources of case-law.*

In many cases we find judges grounding the law upon practical

¹ (1870) L. R. 5 Ch. 751.

² (1865) 12 Jur. N. S. 18; L. R. 1 Eq. 195.

³ (1851) 9 Ha. 415.

considerations which can hardly be said to be of the dignity implied in the term 'public policy.' Thus in *Limpus v. London General Omnibus Co.*¹ the defendants who were omnibus owners were, in accordance with the direction of the trial judge, held responsible, where a driver of one of their omnibuses, though he had been specially instructed by them not to obstruct any omnibus, had driven it across the road in front of a rival omnibus, which was thereby overthrown, and damaged: and there was authority for so holding. It is, however, interesting to observe the ground on which the judges defend the law thus laid down. Thus Byles J. says (p. 541):—

'If we were to hold this direction wrong, in almost every case a driver would come forward and exaggerate his own misconduct, so that the master would be absolved';

and Willes J., in like manner, says (p. 539):—

'It is well known that there is virtually no remedy against the driver of an omnibus, and, therefore, it is necessary that, for injury resulting from an act done by him in the course of his master's service, the master should be responsible; for there ought to be a remedy against some person capable of paying damages to those injured by improper driving. . . . The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability.'

Thus again in *Ridgway v. Hungerford Market Co.*², where the Court of King's Bench laid down the rule, apparently for the first time, that in the case of the dismissal of a servant it is not necessary that a master, having a good ground of dismissal, should either state it to the servant or act upon it, but that it is enough if it exist, and if there be improper conduct in fact, Patteson J. says (p. 179):—

'If we were to hold that it was necessary to trace the dismissal to an act which is to justify it, it would follow that a master, who had made up his mind to dismiss a servant, would give the servant, if he discovered his master's intention, licence to act just as he pleased afterwards.'

While Coleridge J. (p. 180) gives a somewhat different reason for the law, namely, that—

'when a master, sued for wages, defends himself upon the ground that he had dismissed the servant, and that there was in fact something which justified the dismissal, that presents an intelligible issue to a jury: whereas if the inquiry were to be, whether this justifying cause operated in the master's mind, a jury, in the great majority of cases, could not pronounce a satisfactory verdict.'

Again, in *Toogood v. Spyring*³, the point came before the Court

¹ (1862) 1 H. & C. 526.

² (1835) 3 A. & E. 171; 42 R. R. 352.

³ (1834) 1 C. M. & R. 181; 40 R. R. 523; followed in *Taylor v. Hawkins* (1851) 16 Q. B. 308; 83 R. R. 471.

of Exchequer of Pleas for the first time, whether the presence of a third party, when a master accuses his servant of negligence and misconduct in the matter of his employment, takes away the privilege; and the decision was that it does not, on the ground that, in the words of Parke B., delivering the judgment of the Court (p. 194), 'the business of life could not be well carried on if such restraints were imposed on this and similar communications, and if on every occasion in which they were made, they were not protected unless strictly private.' And in *Emmens v. Pottle*¹ the point arose for decision, also apparently for the first time, whether a vendor of a newspaper in the ordinary course of business, who did not know that it contained a libel, and whose ignorance was not due to any negligence on his own part, and who did not know, and who had no grounds for supposing that the newspaper in question was likely to contain libellous matter, was in law publisher of the libel contained in it, and so liable; and the Court of Appeal decided he was not. Lord Esher M.R., with whom Cotton L.J. concurred, decided the point by reference to the consequences which would follow in law if the defendants were held liable.

'The result would be,' he says (p. 557), 'that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shows that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and in my opinion, any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England.'

And so, lastly, in *Darley Main Colliery Co. v. Mitchell*², Lord Blackburn, referring to a well-settled rule of law that all damages which result from one and the same cause of action must be assessed and recovered at one and the same time, says:—

'I think that this rule is established as the general rule of law. I do not think it is one of those rules of law which depend upon natural justice. I think it is an artificial rule of positive law introduced on the balance of convenience and inconvenience. I think that if it were *res integra* a great deal might be said against the expediency of the rule.'

Thus we have seen that a great mass of case-law is purely judge-made law, based upon considerations of justice, morality, common sense, public policy and convenience, and other practical considerations. But these are in truth the grounds—perhaps, indeed,

¹ (1885) 16 Q. B. D. 354.

² (1886) 11 App. Cas. 127, at p. 138.

the only grounds—on which any law can properly be made, whether by judges or by parliament; and it may certainly be claimed that judges make their law with a more single eye to these considerations than any parliament can be expected to do. And if the subject with which these articles have attempted to deal could be worked out with entire accuracy and completeness, we should have a portrayal of the legal mind of England, as it has developed and established itself during centuries of judicial work and thought, so far as regards the proper balancing and harmonizing of these legitimate bases for law.

A. H. F. LEFROY.

University of Toronto.

THE CASE OF SIR EDMUND BERRY GODFREY.

IN the annals of crime few events have attained a greater celebrity than the death of Sir Edmund Berry Godfrey, which inaugurated the reign of terror at the Court of Charles II.

Godfrey was justice of the peace for Middlesex and Westminster, and it was before him that Titus Oates on September 28, 1678, deposed on oath to the existence of the Popish Plot. On October 12 Godfrey disappeared; and five days later his corpse was found head downwards in a ditch, with marks taken to be those of strangulation on the neck, with a large sum of money on it, and transfixed by Godfrey's own sword. The verdict was that he had been throttled and only stabbed after death, and the result of the official inquiry and of three trials (at the chief of which the evidence of one Miles Prance was decisive) was the firm belief that he was murdered in the Queen's palace, Somerset House, by certain Catholics for no very good reason. This has since been generally discredited. The present writer has offered¹ cause for supposing that Godfrey was murdered in Somerset House, not by those hanged for it, but by other Catholics, among them Jesuit priests, for the excellent reason that he had become possessed of a secret which, if published, would have meant utter ruin to their leader, the Duke of York; this secret being that the meeting of the Jesuits on April 24, 1678, was held not, as Oates swore, at a tavern in the Strand, but in the Duke of York's own residence, St. James's Palace.

Mr. Alfred Marks, the latest student of the evidence in this interesting case, concludes it to be one of suicide. His book², which is advertised by an introduction from the pen of a learned Jesuit, seeks to answer the question propounded in its title with scientific accuracy; and as this is purely a question of evidence, no apology shall be made for discussing Mr. Marks's treatment of the evidence at some length. In the investigation of cases of the kind, there are three chief principles to be followed:—

- (1) the principle that the inquirer should understand the character and the general course of events of the times with which he is dealing, and always should keep them present in his mind as a background to the particular facts before him;

¹ The Popish Plot, 1903.

² Who Killed Sir Edmund Berry Godfrey? By Alfred Marks. With an Introduction by Father J. H. Pollen, S. J. Burns & Oates. 1905. xv and 210 pp.

- (2) the principle that he should, in investigating his problem, reject all doubtful evidence unless it is corroborated from other sources, or unless the facts alleged are intrinsically probable and the witness had no motive to falsify them ;
- (3) the principle laid down by the late Dr. Gardiner, which may be called 'the lock and key principle.' I propose to consider Mr. Marks's book in the light of these principles, of which he ignores the two first and challenges the last.

First, as to a general knowledge of the conditions, which, it will hardly be disputed, is a prime requirement. Without a proper acquaintance with the setting and antecedents of his mystery the investigator is at fault from the outset. Yet Mr. Marks's book gives frequent evidence of his lacking exactly this requirement. His knowledge of the pamphlet literature (though not, apparently, of the manuscripts) of the Popish Plot is considerable ; but he has clearly not mastered the special conditions that determined the Plot's history and influence. Thus on p. 2 we read of 'the romances of these wretches of proved infamy,' on p. 3 'proof availed nothing against the oaths of notorious perjurers,' on p. 172 of 'premeditated murder under the forms of law,' on p. 6 that the Revocation of the Edict of Nantes in 1686 was 'the answer to the cry for revenge' for the persecution of Catholics in England in 1679. Of these statements the first shows a serious misunderstanding of the social conditions of the time, the second and third a complete misreading of the judicial practice of the time, the last an artless ignorance of the European history of the time. For example, it is now proved beyond doubt that most of the informers were men of infamous character ; but it is equally certain that it was not proved on their first appearance. To take two of them, Dugdale, until Lord Stafford's trial in December 1680, when his character was hotly debated, was thought to be a man of very decent repute ; and Jennison, whose own brother was a Jesuit, was considered a wealthy country gentleman, coming forward out of pure honesty. The fact ignored by Mr. Marks is that when posts were few and postage dear, when police scarcely existed and detectives and the telegraph were not dreamt of, when coffee-house gossip was undisturbed by the information of an ubiquitous press, and before cross-examination was invented, the state of the public mind implied by his 'proved' did not exist. 'Proved' betrays him : he writes as if all the resources of modern investigation were at command in 1678, whereas in reality it took months and even years to establish facts as to character which nowadays might be common knowledge in a few hours. And there is a further consideration. The evidence of accomplices was

in the seventeenth century the chief, when not the only, means of bringing home crime to its authors; and it was not to be expected that men who had been on their own showing actively engaged in crime should come into court with spotless hands. Mr. Marks might have found testimony in Burnet's history that such evil stories as were at first bruited about concerning Oates were naturally set down as *canards* floated by his enemies: but Burnet is an authority whose excellent information he uses most sparingly, referring moreover, when he does so, to an obsolete edition instead of the standard one by Mr. Airy. Thus Mr. Marks starts on his quest with a sadly false conception of the spirit of the times.

Now, had Mr. Marks written thirty years ago, this would have been intelligible. Then, although his views on the Edict of Nantes might have seemed somewhat queer, the colours in his picture of seventeenth-century England would have passed well enough. But now, if he had profited by Stephen's *History of the Criminal Law*, or by the present writer's *Popish Plot*, or by the excellent account of these matters in Mr. Trevelyan's *England under the Stuarts*, he would have been saved from dishing up a chaudfroid of views which were natural when Lingard wrote but to-day are ignorant. Everyone touching the subject has the means of knowing the state of the law of evidence at the date of the Plot, that alleged traitors were treated in the same way and suffered under the same hardships whether they were Catholic or Protestant, and that proof accepted against them was of just the same character as that accepted against persons charged with other crimes. Mr. Marks, however, has neglected these means.

After this it is not surprising to find him in an error which is shared by so experienced and sceptical an inquirer as Mr. Andrew Lang. Mr. Marks, who does not appear to be acquainted with Mr. Lang's critical essays on the same mystery (in *The Valet's Tragedy* and the *Cornhill Magazine*, August, 1903), argues at length (pp. 54-8) against the possibility of Godfrey having been murdered by Jesuits in Somerset House and afterwards taken to Primrose Hill, on the ground that such a murder would not have been a method adopted by sensible men, and would have meant much needless trouble and risk to the murderers. They would, he thinks, have preferred to sink the corpse in the river, which was convenient. Mr. Lang also conceives that 'your wily Jesuit' would have caused the corpse to disappear. Now here are several misapprehensions, some general, some particular. In general, it is well known that amateurs in crime (persons, that is, who are suddenly confronted by the necessity of committing one, and who are not accustomed to an habitual and vulgar criminal atmosphere)

attempt to divert suspicion from themselves by bizarre and complicated means: they do not realize that the simplest method leaves the fewest clues, and is therefore the safest. Further, both before and after the commission of a premeditated murder its author usually suffers from a nervous excitement so severe that he neglects what to the cool observer seem the commonest precautions: if his instrument is poison, he uses enough to kill a dozen; if cold steel, he leaves the knife where it can be found; if a pistol, he omits to clean it. Every one thinks that if he were to commit a murder *he* would not be such a fool: yet such are among the most ordinary phenomena in recorded cases. The criminal, in short, very seldom does the right thing. In particular, there was a sufficient reason for not causing Godfrey's body to disappear. Nobody undertaking the job could have failed to be conscious that if at that moment of time—twelve days after Oates had 'discovered' the project of an English St. Bartholomew—Godfrey disappeared completely, it would universally be believed that he was the first victim in the massacre. Now, whereas this would have perfectly suited a private or a Protestant murderer, it was what a Catholic would most wish to avoid. Therefore to a Catholic assassin it was essential that the body should be found, but found in such a way as to conceal the motive and manner of the deed. The proper course for such a criminal to pursue was to leave Godfrey's body in circumstances that would clearly point to robbery as the motive of his murder. The surprising thing, however, would have been to find him taking this course: to attempt to secure himself by a strange and elaborate device was in reality far more natural.

The inquirer who is guided by our first principle will constantly ask himself such questions as—What were the actual conditions of the time? How did they, or could they, affect the minds of men then living? How would men of the time ordinarily act in this situation? How would these particular persons be likely to act in it? From the instances touched upon above, and from the fact that he could write a chapter on 'The Fear of Popery' without betraying any knowledge of the existence of the Treaty of Dover or of other Catholic intrigues of the time, it will be concluded that, if these questions did occur to Mr. Marks, he was not in a position to answer them.

Secondly, we come to the principle, which is the very basis of historical thinking, that the inquirer should reject all doubtful evidence unless corroborated, or unless it can be otherwise sufficiently tested. Mr. Marks's conclusion is that Godfrey committed suicide. Now in passing judgment upon a case of violent death,

certainly not caused by accident, it is essential, when the evidence is entirely circumstantial, before identifying its author or authors to know that they had a motive sufficient for the deed. Mr. Marks supplies a motive for Godfrey's committing suicide by the theory that he suffered from hereditary melancholia. This is his own opinion (pp. 96-104). He also submitted to Dr. Freyberger 'a summary of the facts of the case,' together with extracts from the reports of the trials and other works; and on these Dr. Freyberger came to the conclusion 'that Sir Edmund Berry Godfrey was suffering from melancholia; and there can be no reasonable doubt that he committed suicide while he was in this state of insanity' (p. 114).

Before this opinion and the way in which it was obtained are considered, it will be well to notice one or two other points that indicate Mr. Marks's treatment of evidence. On p. 8 he writes: 'It was the brain of Tonge that conceived the Popish Plot,' meaning thereby Oates's story. This idea—that Tonge, a wretched fanatic parson, employed Oates as an agent to publish fictitious revelations invented in London—was used by the latter's enemies to belittle his importance. Possibly, although the modicum of truth embedded in Oates's grandiose lies makes it unlikely, it was true; but there is no justification whatever for asserting it as a fact¹. Again, on pp. 53 and 61 he repeats the statement made by some historians that on the night of October 12, 1678, the court of Somerset House was crowded. This statement comes from the memoirs of James II, who parades it as evidence that the murder could not have taken place there and then without being detected. It is established, however, that James's statement is untrue: orders had been given that the queen (who was sleeping at the palace) was private, and that visitors should not be admitted². Again, on p. 89, Mr. Marks says: 'It is probable that the weather' between October 12 and 17 'was frosty.' It is almost certain that it was wet. The coroner of Middlesex gave evidence: 'The way . . . was dirty³.' On the afternoon of October 16 there was a 'great storm⁴.' On the 15th and 16th Mr. Robert Forset's hounds were hunted over the fields at the foot of Primrose Hill⁵; and although a pack may well be taken out on a frosty day, it will certainly not be taken out the next day, if the frost holds. Lastly, paragraph V of

¹ See *The Popish Plot*, pp. 9, 10, 13 n.

² References to the authorities are given at p. 156 n., *The Popish Plot*. The reference 7 St. Tr. 154 should, however, read 7 St. Tr. 194.

³ House of Lords MSS. 1678-88, 46.

⁴ Lazinby, one of the surgeons, 8 St. Tr. 1384. This evidence refers to October 16 and not 17, as can easily be seen. The question was whether Godfrey's body was in the field on the 16th: every one knew it was there on the 17th.

⁵ 8 St. Tr. 1394.

the Letter to Mr. Miles Prance, published in 1681 to maintain the theory of suicide, states that the roads were so muddy that 'the constable and those that went with him were dirtied and moiled up to the very saddle-skirts¹.'

The question of the weather is of some importance, for, when Godfrey's body was found, his shoes were clean. From which Mr. Marks deduces (p. 107) that the way Godfrey went was 'free from mud,' from which again he deduces the frostiness of the weather. As we have seen, there is a considerable body of direct evidence that the weather was open and the fields muddy: the proper deduction is therefore that Godfrey did not walk to the spot where his body was found, but was carried or driven thither. Even if there were no further evidence, this would be the proper deduction; but it is quite certain that the cleanness of Godfrey's shoes was at the time immediately noticed as extraordinary. If the ground had been hard, the shoes would not have attracted attention; whereas every one who saw the body was struck by their appearance. But, says Mr. Marks, Godfrey was seen in the morning walking towards Paddington and again back², and if the country lanes were soft, his shoes would have been dirtied by Paddington mud as well as by that of Primrose Hill. Mr. Marks does not, however, mention that he was also seen in the Strand close to Charing Cross, not far, that is, from his own house, at about one o'clock³. Where did Godfrey dine? asks Mr. Lang (Cornhill Magazine) very pertinently: we do not know—possibly (it is merely a guess) with one of his Catholic acquaintances, who would naturally hold his tongue—but wherever it was, he may easily have changed or cleaned his shoes first. In any case there is proof positive that the absence of mud on Godfrey's shoes and stockings was remarked with astonishment, the state of the weather considered, and taken by intelligent persons as evidence that he had not walked to Primrose Hill; and the authors of the Letter to Mr. Miles Prance and of the Second Letter lay stress upon the fact to disprove Prance's story that his body was carried thither on a horse. The roads, they aver, were so wet and muddy that a man on horseback must infallibly have been splashed all up his legs. But if the body was taken in a carriage the shoes would be clean—as they were. It is one of those elementary rules of historical inquiry which Mr. Marks seems not to have mastered, that observations by persons actually on the spot must be taken for what they are worth: it is impossible to go behind them.

Again, among the 'unauthorized amendments' (whatever that

¹ 8 St. Tr. 1370.

² Brief Hist. iii. 252.

³ Dep. of Radcliffe, Oct. 19, 1678. Brief Hist. iii. 299.

may mean) which Mr. Marks accuses me of making (pp. 59, 63) are the suggestions that Godfrey's body was removed from Somerset House not, as was believed at the trials, by the main gate and in a sedan-chair, but by a private door and in a coach. Mr. Lang also intimates his disbelief in the existence of a private door, as not being 'proved to exist by the evidence of a chart' (Valet's Tragedy, 87). Yet Ogilby's map of London, published in 1677, shows a gate leading from the east side of Somerset House garden into Strand Bridge Lane; on the west side of the palace no less than six doors are marked on the plan of 1680, printed by Mr. Lang himself, leading into the stable yard, to which the Water Lane Gate gave access; and a passage is marked both in the plan of 1680 and in Rocque's map of 1746, connecting the Water Lane with Dutchy Lane beyond. The possibility of a side door having been used is thus established; the possibility of a coach is inferred from the evidence of the coroner: 'There was a track of a coach in the ground where no coach used to come¹.'

I turn to the motive supplied by Mr. Marks for Godfrey's suicide, the evidence for which rests solely on the authority of depositions collected by Sir Roger L'Estrange in 1686 and 1687, as to the behaviour in 1678 of Sir Edmund Godfrey.

L'Estrange has conveniently summed up his politics in a sentence. 'Reformation,' he says, 'is the proper business of government and council; but, when it comes to work at the wrong end, there is nothing to be expected from it but Tumult and Confusion².' He was in fact the highest of high Tories and Anglicans, from the first totally disbelieved in the existence of a Catholic intrigue and in the murder of Godfrey, and lost no chance of enforcing his disbelief on the public by attacking the Whigs and Nonconformists in his paper, the *Observer*, and in numerous pamphlets. He never concealed that this was his intention, or that his mind was fully made up on the subject before he obtained powers from James II in February, 1686, to examine witnesses on oath as to the cause of Godfrey's death. There can be little doubt that James hoped, if he did not deliberately intend, by this means to cast a final posthumous slur upon the agitation which Shaftesbury had based on the death of Godfrey and the revelations of Oates, and which had all but cost him his throne. A year later L'Estrange received from Sunderland, the secretary of state, an order directing the coroner of Westminster to deliver to him copies of the depositions taken at the time and for the purposes of the inquest in 1678. For the book which resulted from these researches³ and was published

¹ House of Lords MSS., 46. Popish Plot, 157.

² History of the Plot, 1680, preface.

³ Brief History of the Times, Part iii.

in 1688, L'Estrange used, he tells us, sixteen depositions, copies of which the coroner took for him, and an unstated number of depositions freshly taken by himself between 1686 and 1688. Here, it is clear, are two classes of evidence, entirely different the one from the other in origin and value. The 1678 depositions were taken a few days after the facts to which they refer, in the course of an official and regular inquiry, and before opinions on the subject had become crystallized and partisan: the 1686 depositions were taken many years after the event, by a professed and powerful partisan on a special mission for his own side, and when to hold the opinions of the other side had become the mark of a seditious person. Clearly too the former class is far superior, in point both of origin and of date, to the latter. In being used by the inquirer of to-day they should therefore be distinguished; but this is rendered a task of some difficulty by the fashion in which L'Estrange compiled his book, for the 1686 depositions are scattered up and down, often without date or signature, seldom printed *in extenso*, but quoted sentence by sentence where he needed them for his argument. They must be regarded with suspicion and used only with the greatest caution.

Let us see then how Mr. Marks has dealt with evidence of such dubious character. L'Estrange of course professes (as who would not?) to have 'discharged my conscience and my duty with a most affectionate and impartial respect to truth and justice.' Mr. Marks handsomely admits that this profession does not absolve the inquirer from examining the testimony brought forward 'even, in the circumstances, in a critical spirit'; but his admission is qualified by 'the impression that the statement' (as to conscience, justice, and so forth) 'is justified,' and it cannot be said that the application of his critical spirit has left any recognizable traces in his book. He has simply swallowed the 1686 depositions in a lump. What is the good of his saying that the 'lapse of time tends to lessen their value as evidence' (pp. 76, 77), if, when it comes to the point, they are not subjected to the test? The proper guide in matters of this kind is the dictum of Professor Churton Collins: 'The value of evidence, especially in the case of unskilled witnesses, is in exact proportion to its proximity to the experience of which it is the testimony.'

The 1686 depositions are the sole evidence on which the theory of Godfrey's mental derangement is based. Apart from them no scrap of evidence exists that his mind was diseased. He was on the contrary noted for being a fearless, independent man, and an excellent magistrate who had been in some tight places and had always come out of them with credit. Now of the depositions

which would prove him to be so affected, some are concerned with the expression of his voice in speaking ordinary words, with his look, his gesture, his movement and so on, and being taken by L'Estrange years after the event could certainly not be considered trustworthy, even if they were not at points contradicted by good evidence. For example, on the evening before his disappearance, Godfrey was with some friends at the house of Colonel Welden. In 1686 one Radcliffe, who was present, deposed to L'Estrange that Godfrey behaved in a strange and moody fashion. In 1678, on the other hand, Welden said that 'Sir Edmundbury was in good humour'; and at the inquest Radcliffe himself said just the same thing¹. Passing from these, which Mr. Marks uses freely and without question (pp. 100-102), we come to the more material depositions of Captain Gibbon, Mrs. Gibbon, and their daughter, who were in some way connected with Godfrey by blood or marriage. Pausing to notice that we are completely ignorant of the relations of this family with Godfrey, otherwise than appears from their testimony to L'Estrange, and, what is perhaps more important, of their relations with his surviving brothers, we find them saying that Godfrey's father had tried to kill himself, had attacked his children with a cleaver, and had often been bound down to his bed, that Godfrey himself had said, 'I do inherit my father's deep melancholy. . . . My father's dark melancholy hath seized me and I cannot get it out of me,' and that his maidservant had related how the night before his disappearance Godfrey had burnt all his papers². This Mr. Marks (p. 104) terms a 'mass of evidence establishing Godfrey's mental disorder.'

To prove a negative is notoriously difficult and a certain test of the statements thus recorded could hardly be expected to be found. Nevertheless, we may examine them to the best of our ability. And to start with these depositions must assuredly be classed as 'doubtful evidence.' The agent who takes them, the date at which they are taken, the manner in which they are published, are all to the impartial student in the highest degree suspicious. They come practically from a single source; they come through a single and a partisan channel; even the means of knowing whether we have them complete and ungarnished are absent. If they are to be admitted as good evidence without corroboration, doubtful—much less doubtful—evidence on the other side must be admitted too. For instance, we have five depositions taken in June, 1682, one by Mr. Justice Dolben, the remainder by the Lord Mayor, to the effect

¹ House of Lords MSS., 48, Oct. 25, 1678. Brief Hist. iii. 299. See too Popish Plot, 93 n.

² Brief Hist. iii. chs. iii, iv.

that about 9 o'clock p.m. (the hour, according to Prance, of the murder) on Saturday, October 12, 1678, Sir Edmund Godfrey was seen in the Strand close to the Water-gate of Somerset House, and was even seen to stop and speak to some men. We have another taken by Dolben in July 1682, to the effect that two days previous to that date one Captain Spence, who resembled Sir Edmund Godfrey, was assaulted by a group of men in the same place, but was released on one of them crying out 'This is not he¹.' Now, if reliance is placed on these depositions, the probability that Godfrey was murdered in the way and the place described by Prance is immensely heightened; and if the 1686 depositions are claimed as valid, a far better claim can be made for these. Taken less than four years after Godfrey's death, in the course of a public inquiry, and at a time when belief in the Plot was on the wane everywhere and at court a sign of disloyalty, when in fact the Tory reaction had set in strongly, they have far greater authority than those taken four years later by L'Estrange, acting as James's inquisitor. Nevertheless, I do not think they should be admitted: I think that on account of the nature of the facts alleged they should be considered 'doubtful,' and therefore, being uncorroborated, rejected. Similarly, I consider doubtful all the later evidence as to Godfrey's movements on the fatal day.

Here, while the depositions taken in 1682 are under consideration, we may profitably glance at that of Mr. Robert Forset, taken on July 1 of that year by Mr. Justice Dolben. In my judgment Forset's deposition is thoroughly good evidence. The deponent was a gentleman of independent means; the facts he testified to were such as would undoubtedly arrest his attention at the time; yet, when other testimony to the same effect was available, no reason existed why he should come forward until that testimony was questioned and in need of corroboration. His deposition has been referred to above as indicating that the weather on October 15 and 16, 1678, was soft; but the direct point of his evidence was that on the fifteenth his hounds were hunted by himself, and again on the sixteenth by a friend, over the field and along the ditch in which Godfrey's corpse was found on the seventeenth, and that on neither day was the body in the ditch nor were his gloves and cane lying on the edge of the ditch where they were afterwards found. This is very lightly dismissed by Mr. Marks (p. 84) without his offering any serious grounds for so doing. No such grounds in fact exist: either Forset's evidence is decisive, or else it must be set aside as sheer romance—and equally no grounds exist for doing this. It is preposterous to say, as Mr. Marks implies should be said, that a man,

¹ 8 St. Tr. 1387, 1388, 1391-3.

learning the startling fact that a dead body had been discovered in the spot where he and his friend had been looking for a hare on the two previous days and had found nothing, would probably make a mistake in the date unless he referred to his diary. The reason why Forset, who had been twice subpoenaed but not called upon, did not give his evidence earlier was obviously that it only corroborated the evidence at the inquest, summarized by the coroner before the Lords' Committee: 'There was nothing in the field on Tuesday ¹.' His evidence stands on quite a different footing from the later evidence as to the time o'clock when Godfrey was seen, the inflections of his voice, and so forth.

And if this latter evidence is doubtful, still more on general grounds is the Gibbons's evidence doubtful. Indeed, if L'Estrange's statement of Mrs. Gibbon's account of what Godfrey said were accepted, no reason could be alleged for rejecting Burnet's statement of Tillotson's account of what Mrs. Langhorne said ², which would go far to corroborate Oates's information in an important point, and which in my judgment is doubtful and should not be accepted. Moreover, so far from finding corroboration of the Gibbons's testimony, we actually find that grounds exist, though not perhaps of the first order, for rejecting it. Among the 1678 depositions handed to L'Estrange is one taken by the coroner from Mrs. Gibbon for the purpose of the inquest. It is perfectly natural and ordinary, and as unlike her later account of 'my father's dark melancholy,' of which it contains no mention, as can well be imagined ³. What candour in L'Estrange to print it! some may think: L'Estrange, however, never knew when he was contradicting himself ⁴, and certainly expected his assurance that the coroner had orders to 'stifle' Mrs. Gibbon's evidence to be taken on trust. Doubtless in James II's reign it was. The rational inference two centuries afterwards is that at the later date she spiced her evidence for L'Estrange's benefit.

This is one of the grounds for rejecting Mrs. Gibbon. The other is the mention of the subject in the sermon preached at Godfrey's funeral by Dr. Lloyd, who was a friend of the deceased and afterwards as Bishop of St. Asaph earned fame among the 'seven' against James II. Lloyd tells us that after Godfrey's body was found stories were put about to the effect that he might have killed himself 'in distraction, which (they said) was an hereditary disease in his family, that his father and his grandfather had it before him.' Like a prudent and an honest man, Lloyd suspended his judgment until

¹ House of Lords MSS., 47.

² Hist. of my own Times, ed. Airy, Part i, ii, 167.

³ Brief Hist. iii. 322.

⁴ See instances cited at pp. 92 and 93 in *The Popish Plot*.

he had inquired into the facts; and 'I found upon inquiry,' he says, 'that all the colour they had to say it was only this: that his father was sometimes afflicted with melancholy, almost to distraction; but it was before he was fifty years old; he soon recovered of it and lived to the eightieth year of his age. Besides, I am informed that there was never any appearance of the like distemper in any one person of all that numerous family: nor did any of his relations ever come to an untimely end, as has been falsely reported¹.' We have here a competent witness investigating the rumour when fresh and finding it baseless. Lloyd's information implicitly and all but directly contradicts the statements taken by L'Estrange from Mrs. Gibbon eight years afterwards: according to what he could learn, Godfrey's father at one time suffered from hypochondria, but soon recovered and lived to a ripe age—very different from the account of him as a chronic homicidal and suicidal maniac—and none of his family had ever suffered from the same disease. Upon this Mr. Marks comments (p. 97): 'Dr. Lloyd's mention of the grandfather's diseased mental condition is perhaps the only one to be found. That Godfrey's father was subject to mental derangement is well established.' Lloyd states that Godfrey's father was for a short time hypochondriacal: Mr. Marks thence infers that he was habitually deranged. Lloyd states that the grandfather, among others, was perfectly sane: Mr. Marks takes this for proof that he was mad. By similar reasoning the statement that Big Ben had not stopped for two years previous to March 1906 would afford proof that during that time it had never gone.

I have now shown, without touching upon the surgical questions, that it is practically certain—so far as certainty can ever be obtained by circumstantial evidence—that Godfrey's body was not on October 15 and 16 in the place where it was found on October 17, and also that Godfrey did not walk thither but was driven or carried. Since it is inconceivable that he wandered in and about London for four and a half days without being seen, then drove to Primrose Hill and there committed suicide on the night of October 16, it follows that he met his death elsewhere in the interval and that his corpse was carried to Primrose Hill during that night. I have also shown that no reason exists for believing that he was mentally deranged, which is the only hypothesis on which his suicide can be accounted for. It remains to examine the surgical points and the opinion of Dr. Freyberger, quoted at length by Mr. Marks (pp. 108–14). And first it must be observed that whatever, to use Mr. Marks's word, it is 'permissible' to say of Dr. Freyberger, it is not only permissible but necessary to say that Mr. Marks submitted the evidence to him

¹ Lloyd's Sermon, 24.

in a most improper manner. On p. 108 he gives a list of extracts from reports of the trials, &c., though without specifying what extracts, and of other 'information,' with which he supplied Dr. Freyberger, and on which apparently the latter formed his judgment. 'Dr. Freyberger,' he says (p. 90), 'to whom an outline of the case was at first submitted, took great interest in it, and gave to the study of the evidence much time and care.' This method of procedure, it need hardly be said, was entirely wrong. Had Dr. Freyberger wished, he was, like any one else, at liberty to study the problem as a matter of history: his professional knowledge would doubtless have served him well on the surgical points involved; but beyond those points he would have been on the same footing as every other historical inquirer. He would have no claim to offer an expert opinion on a question of historical evidence. He has, however, admittedly not taken this course. He has not studied the case, but an 'outline' of it and other information supplied by Mr. Marks. His opinion is offered as an expert opinion on a matter of professional and technical knowledge.

Let us ask ourselves what is the meaning and use of expert opinion. I take it to be this. The inquirer, studying a subject, finds evidence on the bearing of which he is not competent himself to pass judgment. He therefore applies to some one who is expert in such matters for a technical opinion; and that opinion is only of value in so far as it is technical. It behoves him to see that he obtains a strictly professional opinion: for that the expert is responsible; for the facts on which it is based the responsibility is his own. It is important that the basis of the opinion obtained should be clearly distinguished from the opinion itself, so that those to whom it is offered may be sure exactly how far, and on what points the opinion offered is professional and technical, and how far within the competence of ordinary persons to judge. The expert should know exactly on what technical points his opinion is asked, and should restrain his opinion to the limits set by them. Until he has given his opinion on those points it is most inadvisable that he should take great, or any, interest in an 'outline' of the case, unless he is prepared to study it, as an ordinary inquirer, from end to end, lest considerations not within his professional competence should influence his judgment. The correct and the only safe method, therefore, of obtaining expert opinion is to submit stated points for opinion or questions for answer: the public will then know for what the expert is responsible and for what the inquirer who applies to him. Obtained in any other way, expert opinion is exposed to the reflection made on it in a certain well-known judge's aphorism.

But what has Mr. Marks done? He has thrown before Dr. Freyberger a bundle of evidence good and bad, of information accurate and inaccurate, and has left him to form an opinion on the whole, without, so far as appears, telling him that it was not all of equal authority. Dr. Freyberger has thus been led to pronounce an opinion, partly professional and partly historical, in which occur statements on matters of fact that are open to the gravest doubt. We find him (p. 113) stating that the night before his disappearance Godfrey burned his papers: as we have already seen, this story came at second-hand even to L'Estrange, from whom we have it in a deposition taken in 1686. He states categorically (p. 112), 'Sir Edmund Berry Godfrey was hereditarily tainted. His grandfather had suffered from melancholia. His father . . . tried to commit suicide.' The evidence for this has been examined above and shown to be unreliable; and it is on this and similar evidence that Dr. Freyberger concludes Godfrey to have been insane. Mr. Marks states (p. 91), 'Godfrey's sword was, no doubt, the sword ordinarily worn by gentlemen at the time, . . . quite flat and pointed sharply at the end,' and this is reproduced by Dr. Freyberger (p. 111) with the addition 'with blunt edges along the rest of the blade.' Mr. Marks's information is inaccurate. So far from there being 'no doubt' on the subject, we are wholly without means of knowing what kind of sword Godfrey wore. For all we can tell, he may have worn his father's or his grandfather's. In the history of the sword the latter half of the 17th century is a transitional period, and many different types of blade were in use. Godfrey's may have been a common cut-and-thrust rapier, a *flamberge*, a transitional rapier, grooved, pierced, plain, or diamond-shaped. But if it was a blade of the type in most general use, it was then not what Mr. Marks describes, but a triangular fluted blade of what is known as bayonet-shaped section, rather heavy, and tapered evenly from the hilt down to the point. This blade came into England from France after the Restoration, and preceded the *colichemarde*, invented about 1680, which became a regular type in the 18th century¹. Thus Dr. Freyberger's remarks on the probable shape of the wound are based on a misconception of the facts. These are a few instances of the faultiness of the method adopted; but the greatest objection to it is that we are unable to tell how far such bad evidence and incorrect statements of fact may have influenced Dr. Freyberger's mind in forming an opinion on the surgical questions submitted to him under cover of them.

¹ Egerton Castle, *Schools and Masters of Fence*, 1892, 334-6. See Plates ii, 5, 6, 7; iii, 13, 14; v, 1, 2, 3, 5. See also Captain Hutton, *The Sword and the Centuries*, 185. R. C. Clephan, *Defensive Armour*, 170, 174.

When Godfrey's body was found, three main facts were noticed. His body was transfixed by his sword, which had been driven through it under the left pap, so that the point protruded 'two hand-fulls' from the back; there was no blood on his clothes or in the bottom of the ditch, which was dry¹; and on his neck a strange mark was indented. Five surgeons and two apothecaries saw the body, and on their evidence as to these facts the verdict was based that Godfrey had been strangled and thrust through with his sword only after death. It must be remembered that, though pathological science was at the time in its infancy, doctors undoubtedly had a large practical experience of sword wounds. L'Estrange and the authors of the letters to France maintained that the case was one of suicide, that Godfrey had planted the hilt of his sword in the bank across the ditch and fallen forward on to it, that the absence of blood (when the attempt to prove its presence had failed) was perfectly natural, and that the mark on Godfrey's neck was caused by the pressure of his collar after death. Though L'Estrange did not suggest it, there was one other way in which Godfrey might have stabbed himself. If he wore a short sword, he might, being a tall man, have held it by the hilt and driven it into his body; then, as he died, he might have fallen forward into the ditch. It would have been difficult, but possible.

The technical questions, therefore, for a modern expert are, whether a man could so stab himself with the results noted, whether if he fell on to his sword the absence of external haemorrhage would be natural, and whether the mark recorded on the neck could be caused as suggested by L'Estrange. When working on the case I combined the first two of these questions and submitted the point in general terms to Mr. W. M. Fletcher, M.D., Fellow and Lecturer of Trinity College, Cambridge, and since Senior University Demonstrator in Physiology. His opinion² being decidedly in the negative, it was not necessary to obtain advice as to the third. Dr. Freyberger does not appear to have examined the first question. His opinion as to the second is that, if the sword he describes were used, external haemorrhage need not have resulted. As to the third he says (pp. 110, 111): 'The mark encircling the neck . . . was produced by the high collar which the deceased wore at the time of his death,' by 'the process of post-

¹ Nor, clearly, on the hilt of the sword; for, though this is nowhere stated, great efforts were afterwards made to prove the presence of blood, and had there been a trace of it on the hilt it could not have escaped attention. When the sword was withdrawn there was an effusion of blood and serum from the wound in the back: otherwise the clothes at the back were unstained. On the breast and the clothes in front there was no mark at all.

² Printed at pp. 100, 101 n. in *The Popish Plot*.

mortem hypostasis.' It will be remarked that, as Dr. Freyberger's information concerning the sword was incorrect, and as the evidence concerning 'the high collar' is of the slightest, we should have every right to ask him to reconsider his opinion, formed, as it is, not on a careful hypothesis laid before him but on his own interpretation of particular evidence. He also says (p. 109), assuming the presence of rigor mortis in Godfrey's body, that it would have been impossible to arrange the body as it was found 'some considerable time after death.' It is in fact doubtful whether and to what extent traces of rigor mortis were found in the body.

In view of this opinion I have thought it proper to obtain fresh advice on the technical points involved, and I have been most fortunate in being able to consult so eminent an authority as Mr. Warrington Haward, F.R.C.S., Consulting Surgeon to St. George's Hospital, Hunterian Professor of Surgery and Pathology in the Royal College of Surgeons of England, and President of the Royal Medical and Chirurgical Society. I have submitted for Mr. Haward's consideration the five questions printed below, and by his kind permission now publish his answers. It is needless to say more than that his position and experience give decisive weight to his opinion on such matters.

Question 1. In your opinion, could a man, holding the pommel of his sword in his two hands and placing the point against his chest, exert enough force upon it to drive the sword through his heart and through his body, so that the point projected six or eight inches beyond his back?

Answer—No.

Question 2. If a man, in order to commit suicide, placed the pommel of his sword against or fixed it in a bank on the opposite side of a ditch from himself and flung himself forward upon it, transfixing himself with it, could he, in your opinion, having regard to the resistance offered by the bank to the hilt of the sword, fall into the ditch with the sword in his body without cutting or tearing open the orifice of the wound so as to cause considerable external haemorrhage?

Answer—No.

Question 3. In your opinion, could the marks on a dead man's neck—described as follows—'Below the left ear was a contused swelling, as if a hard knot had been tied underneath. Round the neck was a mark indented in the flesh, merging above and below into thick purple creases. The mark was not visible until the collar had been unbuttoned¹—be produced by a cloth collar worn

¹ Popish Plot, 98. Evidence of Chase and Lazenby, 8 St. Tr. 1381-4.

by the man, by the action of post-mortem hypostasis, the head being found in a downward position?

Answer—No. This mark certainly could not have been caused by the cloth collar, but is precisely what would be caused by a kerchief or cord tied tightly round the neck.

Question 4. Would such marks properly be attributed to the man having been strangled with a cloth, cord, or handkerchief?

Answer—Yes.

Question 5. Would the presence of rigor mortis in the arms and legs prevent the disposal of a corpse in a ditch, with the head downwards and with the left hand under the head, owing to difficulty in flexing the limbs?

Answer—No. If time were available, the body could certainly be thus arranged.

Mr. Fletcher also, learning from me that his opinion was thus traversed in Mr. Marks's book, has been kind enough to obtain other opinion on the subject. He has submitted to Professor Howard Marsh, F.R.C.S., Professor of Surgery in Cambridge University, Consulting Surgeon to St. Bartholomew's Hospital, &c., three questions, which, with Professor Marsh's answers, I have leave to print.

Question 1. Could a man with his own hands transfix his own body with a sword and in such a way that the sword-point should pierce the thorax, pass through the heart, and project some inches beyond the external skin wound in the back?

Answer—I do not regard this as a possibility.

Question 2. Supposing suicide to have been committed in this manner, and a man to have fallen dead in a ditch after such self-transfixion of his own heart and body, is it possible, in your opinion, that there shall be no external hæmorrhage from either of the two skin wounds, front and back?

Answer—This, I believe, is not possible.

Question 3. Supposing a man to have effected self-transfixion of his heart and body by flinging himself upon a sword-point whilst the sword-hilt rested on the ground or against a bank, and supposing him to have done this on or near the bank of a ditch so as to have fallen dead into the ditch, still transfixed by the sword, is it possible, in your opinion, that there should be no external hæmorrhage from either of the skin wounds, front and back, having regard to the chances of a bending or twisting of the sword in the act of transfixion or in the subsequent falling of the body and the consequent enlargement of one or both of the wound orifices?

Answer—I believe it is not possible.

Mr. Fletcher further writes to me himself: 'I see no reason to alter my original opinion, as quoted by you. Certainly a stiff body can be "arranged" in any attitude, and this would become easier as time passed, after the first hours from death.' Mr. Fletcher's questions cover only the ground of the original opinion he gave me, and therefore do not touch the condition of the neck; but his Question 3 covers the case of the sword having been rested on the near side of the ditch, which may be considered a bare possibility, though exceedingly remote. On these points Professor Marsh's opinion entirely confirms that of Mr. Haward: and Mr. Haward's opinion on my Question 5 is confirmed by that of Mr. Fletcher, who speaks on the point with perfect competence.

It will be seen that each question submitted for opinion is framed on a distinct hypothesis couched in general terms, so that the answer would be the same even though Godfrey had never been killed and had never been born, a method which precludes what are known as leading questions from being put directly or indirectly without immediate detection. It will also be seen that, when the opinions of Mr. Haward and Professor Marsh, to whom, as well as to Mr. Fletcher, my best thanks are due, are applied to Godfrey's case, they amount to proof that he did not commit suicide, but was murdered. According to the opinion of these distinguished surgeons we find that, Godfrey's body being discovered in the circumstances and with the marks on it above mentioned, he could not have stabbed himself, he could not have fallen forward on to his sword, he was strangled, and there was nothing to prevent his corpse from being placed in the ditch in the position recorded. It is therefore certain that he was murdered by being strangled, that he was transfixed by his sword after death, and that his corpse was laid where it was found in order to simulate the appearance of suicide. The reader who has followed me to this point has witnessed the delivery of the *coup de grâce* to a theory held by various writers at intervals for upwards of two hundred years.

Lastly, we come to the principle of the lock and the key, enunciated by the late Dr. Gardiner in his book 'What Gunpowder Plot Was.' In dealing with a problem of evidence, said Gardiner, you should try one hypothesis after another until you find the one that fits the facts as the right key fits the lock: 'only when all imaginable keys have failed have you a right to call the public to witness your incompetence to solve the riddle.' The same principle is expressed conversely in the words: 'The force and effect of circumstantial evidence depend upon its incompatibility with, and incapability of, explanation or solution upon any other

supposition than that of the truth of the fact which it is adduced to prove¹; and this method of testing evidence is not only so sound that it has been adopted by all genuine students since scientific criticism first began, and is habitually practised in the courts of justice in both civil and criminal cases, but it is indeed the only one possible. How can the truth ever be discovered except by seeing what explains the facts and what does not? The mind of every competent person, unless prejudiced, works by this process on all matters, whether of history, of criminal investigation, or in judging the truth of things reported in everyday life. All historical inquiry, whether of 'mysteries' or not, is conducted by this means. Do we ask ourselves—Who wrote the Casket letters? For what purpose did Dr. Palmer obtain strychnine at Shrewsbury? Was Cromwell a hypocrite, 'the claimant' a liar, Dreyfus a traitor?—we answer according to what we believe explains the facts. Mr. Lang's studies of mysteries are all directed to show that in each case a certain hypothesis explains or does not explain the facts—generally that it does not. And Mr. Marks, though he abuses those who consciously practise this method and challenges its validity (pp. 22–4), and though he gibes at Gardiner for some expressions which perhaps are not perfectly felicitous, has not one reason to allege against its use. His psychology is at fault; the motives he imputes do not fit the case. Father Gerard, in a work surely the admiration of Mr. Marks, tries on a certain hypothesis to explain the facts of Guy Fawkes's plot. Gardiner, answering him, shows that his hypothesis does not explain the facts, but that another does. Mr. Marks's own book is no more, in the part relative to Godfrey, than an attempt to explain the facts of the case on the hypothesis of suicide. But if indeed Mr. Marks, in saying (p. 24) 'The inquirer who adopts this method has in reality formed his conclusions before complete study of the case to be investigated,' intends to describe the state of his own mind, we shall not quarrel with him. As to the lock and key, all he can say is: 'The metaphor seems to be particularly unhappy.' And he improves it by an illustration from the methods of the burglar. Precisely. The historical investigator is a burglar, striving to enter chambers long since locked up, wherein lie hid their owners' secrets; and the hypothesis is his skeleton key. But perhaps Mr. Marks thinks that certain historical chambers are still private property. Perhaps he thinks that some secrets are better unrevealed.

To sum up. As to Mr. Marks, whose book is issued as a 'straightforward presentation of veracious history,' which should

¹ Wills on Circumstantial Evidence, 5th ed., p. 21.

indisputably prove Godfrey to have killed himself: he has shown ignorance of the conditions of the time and incapacity to deal with evidence; he has made misstatements and misrepresentations; and in obtaining expert opinion on technical points he has adopted a highly improper method. As to Godfrey: apart altogether from the surgical evidence it is practically certain that he did not commit suicide, but was killed in a different place from that in which his corpse was found; on the surgical evidence it is scientifically certain that he was murdered and that his corpse was disposed so as to simulate suicide; and in future no one with knowledge of the subject and pretensions to candour and common sense will be able to maintain the contrary.

JOHN POLLOCK.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

La loi du domicile en matière successorale selon la jurisprudence anglaise. Par ANDRÉ MARION. Paris: Arthur Rousseau. 1906. 8vo. 188 pp.

MONSIEUR MARION'S book is a first-rate piece of work. Among its many merits three points are specially noticeable.

First. It bears witness to the rapid progress made by Frenchmen during recent years in thoroughly mastering legal systems unlike their own. To a lawyer trained in France, the law of England with its feudal traditions, its strange terminology, its constant and, as it may to foreigners appear, perverse departure from schemes of arrangement which on the Continent of Europe are deemed to be founded on the very nature of things, it looks like a maze absolutely without a plan; and among the many branches of English law the Law of Domicil is one of the most technical and perplexed. Its principles are not to be discovered by searching the statute-book; it consists of a series of rules built up by judicial decisions, and expressed in terms which are specially delusive because whilst they sound like the popular language of everyday life, they have yet acquired a technical meaning often hard to be grasped by any man not trained in the practice and fully acquainted with the reports of English courts. But of the tangled intricacies of this obscure province of English law, M. Marion has, we venture to assert after carefully reading his book, obtained a mastery more complete than is possessed by most of our barristers. We put his essay side by side with the equally excellent essay of Mr. Pawley Bate, published under the title of *Notes on the Doctrine of the Renvoi*. The comparison is creditable to each author; each has written well on a very difficult topic, each has shown profound knowledge of his subject: and we detract nothing from the credit due to Mr. Pawley Bate when we say that a knowledge of the Conflict of Laws, as understood in England, which is highly creditable to an English barrister, excites respectful admiration when acquired by a French jurist.

Secondly. Our author has entered into the very spirit of English judge-made law. He understands the process by which it has grown up, he recognizes the ends at which it aims. He grasps, for instance, what most foreign writers strangely fail to perceive, the all-important fact that, in civil matters at any rate, there exists no such thing as a national law applicable to every British subject. When with regard to subjects of the British crown an English judge is forced to decide what is the law which governs succession to their movable property, reference to nationality is of no guidance. No one disputes their allegiance to the Crown. The whole inquiry is, what, when the deceased is a British subject, is the law governing succession to his goods? The judge must obtain some other test than nationality, and the criterion which was originally adopted throughout

civilized Europe, and is now used in the United States and throughout the British empire, is the domicile of the deceased at the time of his death. How could it be otherwise? Note too that the vast majority of the cases referring to domicile which come before an English Court, are cases in which the deceased testator or intestate has spent his life within the compass of the British empire. The inquiry then is, whether the Court is to apply the law, e. g. of England or of Scotland? No possible help can be obtained by reference to allegiance or nationality.

Thirdly. M. Marion's complete comprehension of English law enables him to look at the doctrine of the *Renvoi* from an English point of view. An English judge, our author sees, when determining a case governed by foreign law, and especially when determining questions of succession to the movable property of a deceased person domiciled, e. g. in Belgium, has but one object. His whole aim is to decide the case exactly as it would be decided by a judge sitting at Brussels. But this end cannot be attained unless the English judge takes into account every rule which the Belgian Court would hold applicable. If it should happen that the Belgian Court should, for any reason, hold that the matter before them ought to be determined by the law of France or the law of England, then the law of France or the law of England is the law which the judge at Westminster will follow. So completely indeed has M. Marion become imbued with the spirit of English jurisprudence that he seems greatly inclined to adopt himself the English rule as to the *Renvoi*. If we must speak our whole minds, we think that he has understood that spirit more truly than has Mr. Pawley Bate, whose dialectical skill is hampered by the necessity of maintaining a paradox. Were it possible to provoke a public discussion, held, say, in the Hall of Lincoln's Inn, between these two most excellent and eminent writers, infinite light would be shed upon the relation of English decisions to the doctrine of the *Renvoi*. Each author is so full of information, and so well able to hold his own, that no one would venture to bet with confidence on the result of such a debate.

A. V. D.

The Law of Banking, with an Appendix on the Law of Stock Exchange Transactions. By HEBER HART. Second Edition. London: Stevens & Sons, Lim. 1906. La. 8vo. cvii and 1119 pp. (30s.)

WE heartily congratulate Mr. Hart on the great success of this excellent work, of which the first edition was exhausted before the expiration of two years from the date of its publication. In the second edition, which is now before us, the author has taken great pains to render the book more complete, and to make its arrangement more perfect wherever this appeared desirable or possible. The decided cases have, of course, been brought up to date, and a very useful appendix on stock exchange transactions has been added. In his next edition Mr. Hart will be able to announce that the legislation desired and expected by him for the purpose of setting aside the inconvenient rule established by *Capital and Counties Bank v. Gordon* [1903] A. C. 240, has at last taken place.

Two out of the three passages which in our notice of the first edition were pointed out as open to criticism were altered in accordance with our suggestions, but Mr. Hart adheres to his view (expressed on p. 273 of the present edition) as to the existence of an implied agreement between the customer and the banker, authorizing the banker to charge the customer 'with the amount of any draft, purporting to be a cheque signed by him

and presented in an unaltered form, whether it has been issued by him or not.' We still think that this view is erroneous and inconsistent with the author's own statement as to forged cheques (on p. 288).

We omitted in our former notice to call attention to another point, on which we cannot agree with Mr. Hart. On p. 616 of the present edition 'discounting' as carried on by bankers is described as a 'form of lending.' In our opinion, the terms 'borrowing' and 'lending' are not applicable to an ordinary discounting transaction. In every borrowing transaction the borrower has to repay the amount lent to him at a fixed date or at a fixed period after notice or on demand; if any property is transferred to the lenders by way of security for the loan, the borrower is entitled to redeem such property on repayment of the loan with interest. On the other hand, a banker who discounts a bill for a customer does not become entitled to a claim for the repayment of the amount paid or credited to the customer; in the event of the bill being dishonoured he may, if he complies with the prescribed formalities, acquire a claim for damages against the customer under s. 57 of the Bills of Exchange Act, 1882, but this claim for damages is in the nature of a claim for breach of warranty, and cannot by any stretch of language be described as a claim for the repayment of a loan. While the bill is held by the banker he is absolute owner thereof; the customer would not under any circumstances have a right to redeem it. The American judgment referred to by Mr. Hart in support of his proposition (*National Bank v. Johnson*, 1881, 104 U. S. 271) no doubt contains a dictum to the effect that 'loan' and 'discount' are identical terms, but it is expressly added that the decision in the case before the Court would have been the same, if there were a difference between the two kinds of transactions. The case is therefore no authority on the question, even from an American point of view. On the other hand, English Courts have consistently held that a banker who discounts a bill does not hold it as a 'mortgagee or pledgee, but as an out and out holder'—see *In re Hallett & Co.* [1894] 2 Q. B. 256. An ordinary discounting transaction is an absolute sale of a claim against a third party (embodied in a negotiable instrument of which the ownership passes to the purchaser) with an implied guarantee, on the vendor's part, of the payment of the claim at maturity. The question is one of great practical importance, as, in the event of Mr. Hart's view being correct, no banker could safely discount any bills for a Company with limited borrowing powers. Having regard to the absolute accuracy and lucidity which generally characterizes Mr. Hart's work, which cannot fail in course of time to give to his statements a specially authoritative character, it is all the more necessary to point out the exceptional instances in which his views appear to be misleading.

E. S.

The Principles of the Law of Evidence. By W. M. BEST. Tenth Edition. By J. M. LELY. London: Sweet & Maxwell, Lim. 1906. xxvi and 623 pp. (25s.)

THE fact that only four years have elapsed since the last edition of this well-known work, speaks much both for its intrinsic merits as a law treatise and for the judicious supervision of its present editor, who, by the way, has now stood sponsor for four successive editions. Amongst text-books on Evidence, Best occupies a somewhat unique place. It is not so much a book of practice, as one of history, philosophy, and discussion.

Thus, out of 575 pages of text, only fourteen and four respectively are allotted to the leading topics of Hearsay and Parol Evidence; while such minor points as incompetency from defective intellect, confessions to Clergymen, and the competency of Counsel as witnesses, occupy the disproportionate space of fourteen, eight, and six. A large number of important cases are, in consequence, necessarily omitted. On the other hand, nowhere else, perhaps, can the student find such an exhaustive examination of the history and general principles of evidence.

After such recent revision Mr. Lely has apparently not seen much room for addition or excision. But one novel feature which will be welcome to many readers is the excellent summary given of the Tichborne and Beck cases. Famous as these trials are, condensed reports of them are not readily accessible elsewhere. Mr. Lely also makes several recommendations in his preface for the amendment of the law of evidence; but as these all relate either to punishment for perjury and false confession, or to the pardon of innocent persons, they belong, of course, not to evidence, but to the criminal law, in which department, no doubt, their adoption would be salutary enough. In one or two respects, however, the present editor might, we think, have allowed himself a little freer scope. Thus, if the student is to accept the statement that Bacon's maxim and comment as to ambiguities form 'the recognized basis of the law' respecting parol evidence (p. 208), he will, we fear, find them a very fallacious guide; yet this is all the help that is afforded him in threading the mazes of that most difficult and complicated subject. Moreover it is not correct, in this connexion, to state that the incident of negotiability cannot be annexed to written contracts by usage (p. 210), the reverse having been twice recently decided (*Bechuanaland Co. v. London Trading Bank* [1898] 2 Q. B. 658; *Edelstein v. Schuler* [1902] 2 K. B. 144). Again, in the year 1849, the date of the first edition, it was no doubt perfectly true to say that three grounds of incompetency, i. e. from defective understanding, from want of religion, and from interest 'still exist'; but this statement should hardly be allowed to pass current in 1906. Mr. Lely writes on p. 415 that 'the inclination of the authorities is rather to the effect' that oral as well as written declarations against interest, or in course of duty, are admissible; but although one or two old cases are cited to this effect, the half-dozen more recent ones which expressly decide the point are quite ignored. Under chapter ii of Book II, which deals with the competency of witnesses, we had expected to find the Criminal Evidence Act, 1898, fully considered; but, instead, this topic has been allotted a separate chapter at the end of the volume, where it is, on the whole, very carefully done. Mr. Lely is apparently not aware, however, that his opinion (p. 527) upon the subject of wives who are competent witnesses against their husbands under s. 4 being also compellable, has received judicial confirmation (*R. v. Ellis*, 34 Law Journal, 646). On the other hand, his view that comment by the prosecution upon the failure of a prisoner to give evidence invalidates a conviction has not been sustained.

S. L. P.

A Digest of the Law of Copyright, with Appendix of Statutes. By E. J. MACGILLIVRAY. London: Butterworth & Co. 1906. 8vo. xiii and 92 pp. + [index] 14 pp.

MR. MACGILLIVRAY, whose excellent larger book on copyright was noticed by us four years ago, has now given us a Digest in which any intelligent reader, lawyer or layman, may see the lamentable chaos due to

piecemeal and unmethodical legislation. Copyright in books, paintings, prints and the like, sculpture and music, and performing rights in dramatic and musical work, have been dealt with by a number of separate Acts which abound with omissions, overlappings, obscurities and apparent contradictions. Outside all the Acts is the common law right to restrain the publication of unpublished work, which is still being slowly elaborated by judicial decisions. Mr. Macgillivray quite rightly says in his preface that a merely consolidating Act would be of no real use: 'legislation on this subject, to be of permanent value, must be built on new foundations. The present law is full of so many artificial technicalities that a codification of it is a hopeless starting-point for further legislation.' Unhappily the Parliament of the United Kingdom, with its present forms of procedure, is about the worst legislative machine in the world, and measures of public utility which do not appeal to partisan interests or *odium theologicum* are postponed year after year, or taken up in such a half-hearted fashion as almost to ensure failure. The pitiless exposure of our barbarous copyright law in this Digest ought to stir up authors and publishers, who after all are a considerable body, to insist on more serious attention than they have hitherto received.

We are glad that Mr. Macgillivray has seen his way to put the most reasonable construction on the judgment of Kekewich J. in *Macmillan v. Dent* (see pp. 5, 12, which should be read together); and we hope that his conclusion will be found to have anticipated the judgment still to come of the Court of Appeal. So far as we can tell without a very minute examination, his statement of the law as a whole is accurate, and as clear as the marvellous confusion of the material admits. There seems to be one *casus omissus*, that of a speech or discourse delivered extempore. No doubt can be raised, we conceive, as to the speaker having the same right to restrain publication, whether his words have been committed to writing beforehand, or are spoken with the aid of rough notes, or even without any notes at all. Without doubt, again, important literary work has in fact been spoken to an audience before it was written. We believe this was the case with Mr. Haldane's Gifford Lectures. But the definitions of this Digest, literally read, suggest that there is no possible subject even of the common law right in question until the author's work has been 'graphically produced' by some one. This, we are sure, is not Mr. Macgillivray's intention.

F. P.

Die Strafrechtspflege in Amerika mit Ausführungen zur Deutschen Strafprozessreform. By ADOLF HARTMANN. Berlin: Verlag von Franz Vahlen. 1906. 8vo. xii and 335 pp.

THIS book does not, as its title suggests, give a complete and systematic account of the methods of criminal procedure which are applied in the United States, but contains a series of essays dealing with some of the leading features of those methods, and comparing them with the corresponding methods of English and of German law. The most interesting essays are those dealing respectively with the historical development of the rules as to judicial appointments, with the functions of the American jury, with appeals in criminal matters, with the 'probation system' and 'indeterminate sentences,' and with 'children's Courts.' The author investigates the social, economic, and political factors which have influenced the evolution of the legal institutions of the colonies and territories which now form the United States, and his observations on

the changes in the law, imported by the original settlers, brought about by these factors are highly interesting and instructive. The book is the result of personal inspection and of a careful study of the best authorities, and is written in a very attractive and readable style. It is primarily intended to supply material for the lawyers and officials who are at present engaged in preparing a reform of Criminal Procedure in the German Empire; but its perusal will also be found useful by readers in this country—whether legal practitioners or politicians—who are interested in this subject.

A few inaccuracies as to matters connected with English law may be pointed out. Fox's Libel Act (which applies to all libels, not merely to press libels as stated on p. 72) does not, as the author alleges, 'constitute the jury judges of the law as well as of the facts.' The power of pardon in England is not, as Dr. Hartmann's observation on p. 184 seems to suggest, exercised by the Sovereign in person, but by the Secretary of State; there is therefore no real distinction between the English and the American practice relating to this matter. The 'release on parole,' which the author considers a characteristically American institution (p. 186), seems to be identical in principle with the English ticket-of-leave system. The statement on p. 273, which suggests that there are no cases in English law in which the responsibility of a child for a criminal act depends on the question whether it had sufficient capacity to know that such act was wrong, is of course incorrect. The dates of the statutes referred to on p. 236 are not, as there stated, 1847 and 1854, but 1846 and 1851. We have not discovered any other inaccuracies as to English law; as a general rule, the author's statements on that subject are not only correct but also prove a very clear insight into the practical working of the institutions to which he refers.

E. S.

An Encyclopaedia of Forms and Precedents other than Court Forms. By eminent Conveyancing and Commercial Counsel. Under the general editorship of ARTHUR UNDERHILL, assisted by HAROLD B. BOMPAS and HUMPHREY H. KING. Vol. XI—Public Safety to Sale of Goods. London: Butterworth & Co. 1906. La. 8vo. lv and 609 pp. (27s. 6d. net.)

THIS volume contains the following subjects—Public Safety and Order and Town Government—Railways—Rating (notices of objection and appeal)—Registration of Deeds—Registration of Title to Land—Releases—Royal Charters—Sale of Goods. . . .

The heading 'Public Safety and Order and Town Government' contains preliminary discussions and forms applicable to the matters following, that is to say, Amusements, Building Regulations, Byelaws, Cabs and other Vehicles, Drivers, Horses, &c., Petroleum and Carbide of Calcium, private improvement expenses, Streets, and Miscellaneous Forms. This part of the book will be very valuable to the advisers of local authorities. The only provisions which are of much interest to the general public are those relating to motor cars and drivers at p. 36. We need hardly say that they are most inadequate.

The heading 'Railways' does not include proceedings under the Lands and Railways Clauses Consolidation Acts, which are discussed in vol. viii. The forms under the present headings are for use in connexion with the construction and utilization of the railway and works, and the develop-

ment of the business of the railway company. The writer calls attention to the importance to a person entering into a contract of this nature with a company of seeing that it is not *ultra vires*. Forms are given relating to sidings, running powers, and working agreements. They will be found of great use, and include some which we should hardly have expected to find under this heading, such as, for example, an agreement for letting a railway arch.

The heading 'Rating' is restricted to the notices to be used in ordinary objections and appeals against assessments of property to the poor rate and to the rates that are according to law chargeable or made upon the same basis as the poor rate. The preliminary note is divided into three divisions respectively dealing with rates: (1) outside the Metropolis; (2) within the Metropolis; and (3) both within and without the Metropolis. The forms are divided and classified in a like manner.

The preliminary note to the heading 'Registration of Title of Deeds in Middlesex, Yorkshire, and the Bedford Level' contains much useful information.

We observe that the editors doubt (see note, p. 279) the accuracy of the decision that an unregistered conveyance of land within the Bedford Level is valid for all purposes, except for the purpose of entitling the grantor to the privileges conferred by the Act on the owners of land within the Level and for the other purposes of the Act. But it is submitted that the decision is perfectly correct; it is not, as stated in the note, an opinion expressed by a judge at *Nisi Prius*; it is a decision of *Shadwell V.-C.* No notice is taken of the North Level Act, 1857 (20 & 21 Vict. c. cix, Local and Personal), exempting the North Level Act from the jurisdiction of the Bedford Level Corporation.

The collection of forms for use in the Middlesex and Yorkshire Registers will be very useful.

Perhaps the most interesting part of the volume is the heading 'Registration of Title to Land.' The preliminary note explains the distinction between registration of title and registration of deeds, and contains a concise account of the successive enactments as to registration of title.

The statement of the law as to the existing Acts is lucid, and leaves little to be desired. There is a valuable remark at p. 332 in the discussion of unregistered dealings with registered land. The editors point out that if after first registration the register were neglected an owner, who ultimately agreed to sell the land, might find under certain circumstances that it was almost impossible to comply with the provisions of s. 16 (2) of the Act of 1897, under which, if the vendor of registered land is not himself registered as proprietor, he shall at the request of the purchaser and at his own expense, and notwithstanding any stipulations to the contrary, either procure himself to be registered as the owner, or procure a transfer from the registered proprietor to the purchaser.

We should have been glad to have learnt the opinion of the editors on a few moot points.

First, as to the effect of notice to an intended purchaser of equities not protected by entries on the register.

Second, what investigation ought to be made of the title to easements over registered land dealt with after first registration?

Third, what investigation ought to be made of the title to restrictive covenants or conditions imposed on registered land after first registration?

Fourth, whether a mortgagee selling by virtue of a mortgage prior to

first registration is bound to be registered or to procure a transfer from the registered proprietor?

Fifth, in what cases it is prudent to take an unregistered assurance as well as a transfer? The importance of taking an unregistered mortgage as well as a registered charge is pointed out at p. 328, note 1.

The collection of forms contains all that will be required for the ordinary purposes of conveyancing.

The heading 'Releases' contains a preliminary note and precedents of (1) releases of persons, (2) releases in respect of property, and (3) miscellaneous releases. The preliminary note contains much useful information, and appears to be accurate; the collection of precedents contains those in common use, and some which, so far as we know, are not to be found in any book of precedents.

The heading 'Royal Charters' contains directions for obtaining municipal charters, charters for trading companies, and charters for incorporations, charitable or other institutions, and the appropriate forms.

The heading 'Sale of Goods' contains a very useful epitome of the law applicable thereto, including the law of absolute Bills of Sale. The precedents contain a general form of conditions on a sale by auction of goods, and special conditions on sales of books, pictures, and horses. They also contain a number of miscellaneous contracts and other instruments relating to the sale of goods. Many of the forms are not to be found in any of the collections of Forms and Precedents in general use.

In conclusion, we can say that this volume is worthy of being classed with its predecessors.

The Customs Laws. By NATHANIEL J. HIGHMORE. London: Stevens & Sons, Lim. 1906. xli and 383 pp. (6s.)

THIS little volume is a striking commentary on the smoothness with which our Customs laws are worked.

Customs duties, as their name imports, are as ancient as almost any institution in this country. Even in Magna Charta they are spoken of as 'antiquas et rectas consuetudines,' and they have been in some degree regulated by Parliament as long as Parliament itself has existed, the first grant of new Customs having been made by the first Parliament of Edward I (see Dowell's History of Taxation, vol. i, ch. 5).

How much money has been raised by Customs duties since that time it would probably be impossible to estimate with any reasonable approach to exactitude; but in the year ending March 31, 1905, the amount exceeded £35,000,000.

Yet so little litigation has there been that Mr. Highmore finds only eighty reported cases worthy of citation, a number which contrasts strikingly with the number of cases on Income Tax and Stamp Duties; and we have no reason for thinking that any case of practical value has been omitted from his book.

Questions upon the law relating to Customs duties seldom come before ordinary practitioners, and Mr. Highmore, as Solicitor to His Majesty's Customs, may fairly lay claim to be above all others a specialist in the subject upon which he writes. His book contains all the effective statutes relating to Customs, some forty or fifty in number, admirably arranged and well annotated and indexed. He has adopted the excellent, if somewhat unusual, plan of arranging the statutes according to their subject-matter, regardless of their date. Thus Part I, dealing with the existing

Customs Tariff, contains portions of the Acts of 1876 and of the Finance Act, 1901, as modified by later Acts; Part II consists of the greater part of the Customs Consolidation Act, 1876, with amending Acts; Part III comprises enactments relating to particular goods; Part IV contains the Customs laws and tariff of the Isle of Man; and Part V miscellaneous statutes affecting the customs.

Nor is the arrangement of the subject-matter the only merit of the work; the notes upon the sections and the cross-references are no less meritorious; and as regards accuracy, we can find no cause of complaint. After some search we thought we had found one misprint, to wit, in the text of s. 194 of the Customs Consolidation Act, 1876; but on reference to the editions printed by authority we find the responsibility for the grammatical error, if it be one, must rest with either Parliament or the Queen's Printers.

The Principles of Commercial Law. By JOSEPH HURST and LORD ROBERT CECIL. Second Edition by JOSEPH HURST. London: Stevens & Haynes. 1906. 8vo. lv and 431 pp. (10s. 6d.)

A BETTER title for this book would be 'Some Notes on Commercial Law,' for though it contains a considerable amount of information on a multitude of topics, there is but little exposition of principles.

The first edition, which appeared about thirteen years ago, showed that the skill of the authors in expounding principles was not equal to their industry in the collection of materials. It contained many isolated statements, to which taken singly no objection could be made, but which by reason of their isolation were often insufficient if not misleading. And we cannot say that in this respect the edition now before us shows any great improvement on its predecessor.

For instance, the subject of arbitration is dealt with in two or three paragraphs. After stating that agreements to refer cannot be pleaded as a defence at Common Law, and referring to the statutory power to stay actions under s. 4 of the Arbitration Act, 1889, the effect of the remaining provisions of that Act is thus stated: 'Further, by the recent statute a submission of present or future disputes to arbitration is irrevocable as soon as arbitrators have been appointed thereunder; but no power is given by the Act, or existed before, to compel any party to a submission to appoint an arbitrator, though a refusal to do so is a breach of the agreement, and may be the subject of an action.'

Who would suppose from this passage that a submission is and always was irrevocable both before and after the appointment of an arbitrator; that the Court now has extensive powers for overcoming the reluctance of a party to appoint an arbitrator or umpire; and that an action for breach of an agreement to refer is in practice an unheard-of remedy?

Again, treating of the Bills of Lading Act, it is stated that by that Act 'the bill of lading is only conclusive evidence of the shipment as against the master or other person signing the same, but an erroneous statement therein will bind no one else. Therefore a statement contrary to the actual fact will impose no liability on the shipowner.' This is, indeed, a lame exposition of the extent to which admissions in a bill of lading may affect the shipowner as admissions made by an agent or by estoppel.

The statutory modification of the Common Law rule is stated—and not even correctly stated—as if it were the whole law on the subject. We

might refer the learned editor to the recent case of *Comp. Nav. Vasconzada v. Churchill & Sim* [1906] 1 K. B. 237, where some aspects of the question are very fully discussed, as well as to *Grant v. Norway*, 10 C. B. 665, which is cited, but apparently with no appreciation of its effect.

The present edition seems to differ but little from the first, except that the Sale of Goods Act is set out in full with a few notes in place of the original chapter on the subject. We have searched in vain for some reference to many important cases relating to the topics dealt with. Among those whose absence is most noteworthy are *Lawford v. Billericay Council* [1903] 1 K. B. 772; *The Wingfield* [1902] P. 42; *Universal Stock Exchange v. Strachan* [1896] A. C. 166; *Scott v. Brown* [1892] 2 Q. B. 724; *Jones v. Scullard* [1898] 2 Q. B. 565; *Bentsten v. Taylor* [1893] 2 Q. B. 274; *Keighley, Mazsted & Co. v. Durant* [1901] A. C. 240; and *In re Tiedemann & Ledermann Frères* [1899] 2 Q. B. 66. The points dealt with in the last two cases are hardly touched on, but a chapter on the law of agency cannot be regarded as in any degree complete without some reference to the rules as to ratification.

Building Cases. By F. ST. JOHN MORROW. London: Butterworth & Co. 1906. La. 8vo. xxxvi, 385 and 80 (index) pp. (15s. net.)

THIS compilation purports to be a digest of reported decisions affecting architects, surveyors, builders, and building owners. The work consists of summaries of cases arranged as a digest according to their subject-matter, supplemented by a very complete index and tables of cases and of statutes. The digest contains selections from all the reports, English, Irish, and Scotch, from the early seventeenth century onwards. Among them are many *nisi prius* and practice cases, and others which are mere findings of fact taken from newspapers.

The book is designed to be useful 'not only to members of both branches of the legal profession and the parties whose rights and liabilities are therein defined, but also to the large body of officials who are engaged in administering local government.'

The author candidly admits that among the cases 'will be found some decisions which have been overruled by subsequent decisions of the High Court, because, although they can no longer be relied on in courts of justice, they frequently furnish valuable assistance to those whose duty it is to advise parties as to their legal position.'

We should have thought that the one place in which an overruled case might sometimes be used is a Court of Justice, where overruled cases are often valuable to establish a principle or explain the history of a doctrine. In the hands of 'the parties whose rights and liabilities are defined' and of officials, an overruled case, or one decided on a repealed statute, is a dangerous weapon, especially if it is supplied without any warning of the limitations of its application. Thus in the group headed 'ancient and other lights,' we find *Kelk v. Pearson* (L. R. 6 Ch. 809), *Calcroft v. Thompson* (15 W. R. 887), and *Lazarus v. Artistic Photographic Company* [1897] 2 Ch. 214 set forth without comment, and *Lanfranchi v. Mackenzie* (L. R. 4 Eq. 421) is cited as deciding that 'in order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years.' *Lanfranchi v. Mackenzie* is approved in *Colls v. Home and*

Colonial Stores [1904] A. C. 179, but *not* as deciding that proposition. Under 'Light and Air' we find *Trahern's Case* (Godb. 221) cited without warning, and a case of *Dickey v. Pfeil* (reported in Fletcher's 'Light and Air'), in which Fry J. is alleged to have granted an injunction in such circumstances, that one can only infer he was oblivious of *Webb v. Bird* (10 C. B. N. S. 268).

Under 'Action' we find a case on notice of action under the repealed s. 102 of the Metropolitan Local Management Act, 1862, without any notice of the repeal, and elsewhere are obsolete cases on the Metropolitan Building Act, 1855, and on the repealed sections of the Fires Prevention Metropolis Act, 1774, which at one time regulated building operations in the Metropolis.

We should add that there is a useful appendix, which contains a form of agreement and schedule of conditions for building contracts, the rules of professional practice approved by the Society of Architects, and Ryde's Scale of Surveyor's fees.

We have also received :—

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND. Tenth Edition. Oxford: Clarendon Press. London: Henry Frowde and Stevens & Sons, Lim. 1906. 8vo. xxv and 443 pp. (10s. 6d.)—This is by no means the first time we have been called on to admire Prof. Holland's diligence in keeping his work, now twenty-six years old, up to date, and we hope it is as far from being the last. Next to nothing of the recent material appropriate to the learned author's purpose has been overlooked, and next to nothing that has become obsolete is retained. Prof. Holland does not, like a brilliant German colleague who lumps him and Austin together as 'Naturrechtler,' range from the Vedantic philosophy to Morgan's theory of prehistoric kinship; but English readers prefer to have the facts given them in an orderly manner and fit them into their general solution of the universe (if any) for themselves. We would suggest that in a future edition the 'realist' account of artificial persons may deserve more than a footnote; that something may have to be said about the Japanese adoption of Western legal ideas; and that a more explicit statement as to the indirect as well as direct results of the Hague Convention, if not necessary, would be useful.

Encyclopaedia of the Laws of England, with Forms and Precedents. By the most eminent legal authorities. Second Edition. Revised and Enlarged. Vol. I. Abandonment to Banker. Edited by Mr. Justice A. WOOD RENTON and MAX. A. ROBERTSON, with a General Introduction by Sir F. POLLOCK. London: Sweet & Maxwell, Lim. Edinburgh: Wm. Green & Sons. 1906. La. 8vo. xvi and 712 pp. (21s. net per vol.)—We cannot now do more than note the appearance of the first volume of the new edition of this excellent work. All the articles have been revised and many of them enlarged. As an instance of the considerable additions made, we may mention the article on 'Appeals.' In the first edition only fifteen pages were allotted to this subject. Mr. Charles Burney's article in the present edition occupies nearly fifty pages.

An especial feature of this issue is the addition of forms to many of the articles. Those in the present volume (e. g. Abstract of Title, Advowson, Allotments, Arbitration, Attestation, &c.) look eminently practical and useful, and should in most cases be sufficient for the ordinary needs of the practitioner without the necessity of consulting other works.

An Exposition of the Law relating to Factories and Shops in Victoria. By W. A. SANDERSON. Melbourne: Stilwell & Co. 1906. xv and 160 pp. (3s. 6d.)—This is a publication of purely local interest, giving the provisions of the two Acts of 1905 which contain the legislation on the subject in the form of a kind of paraphrase of every section, together with an introduction and a print of the Regulations made under the authority of the Acts. Both employers and employees in Victoria should find the book convenient, and the enactments easy to understand.

The Foundations of Legal Liability: a presentation of the Theory and Development of the Common Law. By THOMAS ATKINS STREET. Three vols. Northport, Long Island, N. Y.: Edward Thompson Company. 1906. La. 8vo. Vol. I, xxix and 500 pp. Vol. II, xviii and 559 pp. Vol. III, xi and 572 pp.—Review will follow.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS, J. G. PEASE and ARTHUR B. CANE. Vols. LXXXIII, LXXXIV and LXXXV (7 Moore, P. C., 1 Mac. & G., 1 & 2 Hall & Twells, 11 & 12 Beavan, 3 De G. & Sm., 8 Hare, 17 Simons, 16 & 17 Queen's Bench, 10 Common Bench, 18 Law Journal, 12 & 13 Jurist). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1906. La. 8vo. Vol. LXXXIII, xv and 883 pp. Vol. LXXXIV, xv and 898 pp. Vol. LXXXV, xiv and 815 pp.

Act of State in English Law. By W. HARRISON MOORE. London: John Murray. 1906. 8vo. x and 178 pp. (10s. 6d. net.)

A Handbook of Legal Medicine, intended for the use of the Legal Profession. By WILLIAM SELLERS, M.D. Manchester: at the University Press. 1906. 8vo. 294 and vii (index) pp.

Digest of Law Reports of the late South African Republic, including cases decided during the British occupation prior to 1881, for the period 1877 to 1899. By J. P. R. VAN HOYTEMA and SIEGFRIED RAPHAELY. Grahamstown, Cape Colony: African Book Company, Lim. 1906. La. 8vo. xxxviii pp. and 414 columns. (£1 15s. net.)

Reports of Cases decided by the Railway and Canal Commissioners, together with table of, and index to, cases reported in vols. vii to xii. By J. H. BALFOUR BROWNE, K.C., WALTER H. MACNAMARA and RALPH NEVILLE. Vol. XII. London: Sweet & Maxwell, Lim. 1906. La. 8vo. xvi and 316 pp.

An analytical Digest of Cases published in the Law Journal Reports and the Law Reports; 1901-5. By JAMES S. HENDERSON. London: Stevens & Son, Lim.; Sweet & Maxwell, Lim. 1906. 4to. lxi and 969 pp. (30s.)

Principles of the English Law of Contract. By Sir W. R. ANSON, Bart. Eleventh Edition. Oxford: at the Clarendon Press. London and New York: Henry Frowde. 1906. 8vo. xxxvi and 406 pp. (10s. 6d.)

An Introduction to Hindu and Mahomedan Law for the use of Students. By Sir WILLIAM MARKBY, K.C.I.E. Oxford: at the Clarendon Press. 1906. 8vo. 172 pp. (6s. net.)

Borough Customs. Vol. II. Edited for the Selden Society by MARY BATESON. London: Bernard Quaritch. 1906. 4to. clix and 224 pp.

Appeal Cases under the Weights and Measures Acts, &c. By G. F. ALLWOOD. London: Butterworth & Co.; Shaw & Sons. 1906. 8vo. xxiii, 205 and 25 pp. (6s. net.)

The Economic Development of a Norfolk Manor, 1086-1565. By FRANCES GARDINER DAVENPORT. Cambridge: at the University Press. 1906. 8vo. x, 105 and cii pp. (10s. net.)

Code Civil Allemand. Two vols. Paris: à l'imprimerie Nationale. 1904-1906. 8vo. Vol. I, xlvii and 649 pp. Vol. II, 852 pp.

Il Delitto Civile. By GIOVANNI BRUNETTI. Firenze: Bernardo Seeber. 1906. 8vo. xxiii and 523 pp. (l. 8.)

*The Editor cannot undertake the return or safe custody of MSS.
sent to him without previous communication.*

His address is 13 Old Square, Lincoln's Inn, not Oxford

OXFORD: HORACE HART
PRINTER TO THE UNIVERSITY



3 6105 06 129 501 5

